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No. _____

In The

Supreme Court of the United States

October Term, 1998

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

vs.

HAROLD DAWAVENDEWA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When enacting Title VII of the Civil Rights Act of 1964, Congress expressly exempted certain employment preferences "given to any individual because he is an Indian living on or near a reservation." § 703(i), 42 U.S.C. § 2000e-2(i). In *Morton v. Mancari*, 417 U.S. 535, 548, 94 S. Ct. 2474, 2481 (1974), this Court stated that § 703(i) is consistent with Congress' policy of promoting tribal sovereignty and self-governance, "the longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal or 'on or near' reservation employment." The Ninth Circuit interpreted § 703(i) narrowly such that the Navajo tribe may not require employers located on reservation lands leased from the Navajo tribe to give employment preferences to members of the Navajo Nation over members of other tribes.

(1) Does the Ninth Circuit's interpretation frustrate Congress' intent of promoting tribal sovereignty and self-governance, particularly in light of Congress' recent explicit endorsement of tribal-based preferences in the context of the Indian Self-Determination and Education Assistance Act?

(2) Do the principles this Court announced in *Morton v. Mancari* require the conclusion that preferences given to Indians based on their tribal affiliation are political (and not based on race or national origin) and are therefore beyond the scope of Title VII altogether?

RULE 29.6 LISTING

Petitioner Salt River Project Agricultural Improvement and Power District is a municipal corporation and a political subdivision of the State of Arizona. It has no parent company or nonwholly owned subsidiary.

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PETITION FOR WRIT OF CERTIORARI

The Salt River Project Agricultural Improvement and Power District ("Salt River Project") respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 154 F.3d 1117. The opinion of the district court (App., *infra*, 20a-27a) is unreported.

JURISDICTION

The Ninth Circuit entered its judgment and opinion on September 14, 1998. The Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing en banc on January 13, 1999. (App., *infra*, 28a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Civil Rights Act of 1964, § 703(i), 42 U.S.C. § 2000e-2(i):

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of

such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

STATEMENT OF THE CASE

A. Essential Facts.

Petitioner, the Salt River Project, is a municipal corporation and political subdivision of the State of Arizona. It operates an electric generation facility known as the Navajo Generating Station, which is located within the boundaries of the Navajo Indian Reservation.

The Navajo Generating Station was built on Navajo tribal lands pursuant to a lease the Salt River Project negotiated with the Navajo Nation in 1969. The lease expressly requires the Salt River Project to give employment preferences at the Navajo Generating Station to members of the Navajo Nation:

> Lessees agree to give preference in employment to qualified local Navajos, it being understood that "local Navajos" means members of the Navajo Tribe living on land within the jurisdiction of the Navajo Tribe. . . . In the event sufficient qualified unskilled, semi-skilled and skilled local Navajo labor is not available, or the quality of work of available skilled or semi-skilled workmen is not acceptable to Lessees, Lessees may then employ, in order of preference, first qualified non-local Navajos, and second, non-Navajos.

(App., *infra*, 2a-3a (n.2)).

The lease's employment preference requirement is similar to the requirement in the Navajo Preference in Employment Act, 15 Navajo Nation Code § 601 *et seq.* (1995), which the Navajo Nation enacted in 1985. The tribal statute requires that "all employers doing business . . . [on or near the reservation] of the Navajo Nation . . . shall . . . [g]ive preference in employment to Navajos." *Id.* at § 604(A)(1).

Respondent is a Hopi Indian who resides a few miles away from the Navajo Reservation. In 1991, he applied for employment at the Navajo Generating Station. When the Salt River Project did not select him, Respondent filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), challenging the Salt River Project's employment preferences for Navajos. The EEOC found in Respondent's favor and issued a Notice of right to sue.

B. Proceedings Below.

1. District Court.

Respondent filed suit against the Salt River Project in the federal district court for the District of Arizona. On behalf of himself and a proposed class, Respondent alleged that giving employment preferences to Navajos, as required by the Salt River Project's lease with the Navajo Nation, violated the prohibition against national origin discrimination in Title VII of the Civil Rights Act of 1964. Accordingly, Respondent alleged jurisdiction based on 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. § 2000e-5.

The Salt River Project moved to dismiss Respondent's complaint, contending that employment preferences given to

Navajos under the lease requirement are exempt from Title VII's prohibitions. Title VII expressly states:

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Civil Rights Act of 1964, § 703(i), 42 U.S.C. § 2000e-2(i). The Salt River Project alternatively argued for dismissal because distinctions between Navajo and non-Navajo Indians are political distinctions outside the purview of a national origin claim, relying on this Court's holding in *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474 (1974).

The district court held that interpreting the exemption in § 703(i) to permit tribal based employment preferences is consistent with the federal government's commitment to promoting tribal self-government. It found particularly persuasive Congress' recent explicit endorsement of "tribal employment rights ordinances (TERO) (which generally provide for tribal preferences in employment for tribal members)" in the context of the Indian Self-Determination and Education Assistance Act ("ISDA"). S. Rep. No. 374, 103d Cong., 2d Sess. 5 (1994).

The district court declined to follow an EEOC policy statement which interpreted § 703(i) as not permitting preferences based on tribal affiliation. It noted the EEOC had relied heavily on regulations issued by other agencies which – following Congress' endorsement of tribal affiliation preferences in the ISDA – had either been

effectively negated or been eliminated outright. Accordingly, the district court granted the Salt River Project's motion to dismiss.

Because it granted the motion to dismiss based on the Indian preference exemption in § 703(i), the district court declined to reach the Salt River Project's alternative argument based on *Morton v. Mancari*.

2. Court of Appeals.

Respondent appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. The panel decision, authored by Judge Stephen Reinhardt, characterized the purpose underlying the Indian exemption in § 703(i) as allowing employment preferences to individual Indians "in order to compensate for the effects of past and present unjust treatment." (App., *infra*, 12a). Moreover, because the Ninth Circuit believed the ISDA and Title VII "have fundamentally different purposes," it concluded that Congress' recent amendment of the ISDA and its express endorsement of tribal ordinances requiring employment preferences based on tribal affiliation provide "no support" for the district court's interpretation. (App., *infra*, 14a-15a) ("whatever Congress decided to do with respect to amending the ISDA in 1994 has little if anything to do with what it intended when it drafted Title VII"). Consequently, the Ninth Circuit held that the Indian preference exemption in § 703(i) does not permit preferences based on tribal affiliation.

The Ninth Circuit also held that employment preferences based on tribal affiliation constitute national origin

discrimination under Title VII. (App., *infra*, 8a-9a). In doing so, the Ninth Circuit concluded that *Morton v. Mancari*'s holding – that employment preferences of Indians over non-Indians are political distinctions based on membership in "quasi-sovereign tribal entities," and not based on race – has no application in this case. Indeed, the Ninth Circuit characterized the preference at issue in *Morton v. Mancari* as one "based on a racial classification," but which nevertheless did not violate the constitution because it was motivated by the "legitimate non-racial purpose" of promoting tribal self-governance. (App., *infra*, 8a). The Ninth Circuit also concluded that the interests of Indian self-governance are "not present in this case." (*Id.*).

The effect of the Ninth Circuit's narrow interpretation of § 703(i) is that tribes no longer can require employers (either by contract, as in this case, or by tribal ordinance) to give employment preferences to their members. Yet, the Ninth Circuit decision fails to analyze or even discuss tribal sovereignty concerns. Similarly, although the Ninth Circuit acknowledges its interpretation creates a potential conflict between Title VII and the ISDA, it made "no attempt to resolve" the conflict because this particular case did not involve a self-determination contract under the ISDA.

REASONS FOR GRANTING THE PETITION

This case raises important issues of federal employment and Indian law which affect the inherent tribal sovereignty of Indian tribes throughout the country. Also,

the Ninth Circuit itself acknowledged that its holding creates (but leaves unresolved) a conflict between two important federal statutes. Moreover, the analysis in the Ninth Circuit's published decision is contrary to this Court's well-established Indian law and racial discrimination precedents, and results in an erroneous holding. For all these reasons, this petition for writ of certiorari should be granted.

I. This Case Raises Important Issues of Federal Employment and Indian Law, Affecting the Sovereignty of Hundreds of Indian Tribes Throughout the Nation.

The effect of the Ninth Circuit's narrow interpretation of § 703(i)'s Indian preference exemption extends well beyond a simple employment discrimination claim by an unsuccessful applicant against a single employer. Instead, the decision below raises important questions about inherent tribal sovereignty that go to the heart of the federal government's trust relationship with Indian tribes. Fundamentally, this case addresses whether Congress intended to abrogate inherent tribal sovereignty rights when it enacted Title VII.

This Court has long recognized that "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 909 (1991) (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)). Consistent with the notion of inherent sovereignty, this Court has repeatedly acknowledged "that tribes retain

considerable control over nonmember conduct on tribal land." *Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1413 (1997). Indeed, although to a lesser degree, "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians . . . on non-Indian fee lands." *Montana v. United States*, 450 U.S. 544, 565, 101 S.Ct. 1245, 1258 (1981). Significantly, the Ninth Circuit itself has recognized that tribal inherent sovereignty includes the authority to enforce their own employment ordinances on employers doing business within their reservations, even when such employers are located on non-Indian fee land. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991).

In this case, the Salt River Project – as required by the Navajo Nation – gives employment preferences to Navajos for jobs located on the Navajo Reservation. By holding that such preferences violate Title VII, the Ninth Circuit has significantly limited the Navajo Nation's right of self-governance with respect to its own lands and the economic activity on the reservation generally. The lease with the Navajo Nation which permits the Salt River Project to operate its electric generating facility on tribal lands requires the Salt River Project to give employment preferences to Navajos. The Navajo Nation viewed the employment preference provision of the lease as "the significant benefit of its . . . bargain" with the Salt River Project. *See* Navajo Nation's *amicus* brief filed in the Ninth Circuit in support of Petition for Rehearing at 2.

The Ninth Circuit's decision in this case effectively invalidates not only the preference provision in the Navajo Nation's lease with the Salt River Project, but also all other similar lease provisions with other employers

doing business on the Navajo Reservation. Furthermore, as the Ninth Circuit noted, the lease provision "is consistent with" a Navajo tribal ordinance which requires all employers on the Navajo Reservation to give employment preferences to Navajos. (App., *infra*, 2a-3a) (citing 15 Navajo Nation Code § 604 (1995)). Thus, the Ninth Circuit's decision also effectively invalidates the Navajo Nation's tribal ordinance. Such incursions on the inherent tribal right to control tribal lands and self-govern economic activities on the reservation raise important federal Indian law issues of tribal sovereignty.

The effect of the Ninth Circuit's decision, however, goes substantially beyond the important issues related to just the Navajo Nation. It also puts in doubt the validity of every similar lease provision and tribal employment rights ordinance used by any of the hundreds of federally-recognized Indian tribes throughout the nation.

Congress gave some indication in 1994 of the extent to which such ordinances requiring tribal-based preferences are used. At that time, Congress expressly endorsed the use of employment preferences based on tribal affiliation in the context of the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450 *et seq.* The ISDA included a provision which required that employment preferences "shall be given to Indians." 25 U.S.C. § 450e(b)(1). Like the Ninth Circuit in this case, the agencies charged with interpreting the ISDA (the Department of the Interior and the Department of Health and Human Services) had narrowly interpreted "Indians" to require that employment preferences be given to all Indians, "regardless of tribal affiliation." 59 Fed. Reg. 3185 (Jan. 20, 1994) (proposed regulation).

Congress rejected that narrow view and amended the ISDA to make it clear that "the tribal employment or contract preference laws adopted by such tribe shall govern." 25 U.S.C. § 450e(c) (Supp. 1998). Explaining the need for the rejection of the narrow view, the Senate Report from the Committee on Indian Affairs noted that tribal employment rights ordinances enacted by the various tribes (sometimes referred to as "TEROs") "*generally* provide for tribal preferences in employment for tribal members." S. Rep. No. 374, 103d Cong., 2d Sess. 5 (1994) (emphasis added).

Accordingly, this case has important and potentially wide-spread implications for Indian tribes throughout the country. Under the Ninth Circuit's erroneous interpretation of § 703(i), each tribe's employment rights ordinance requiring employment preferences for tribal members (as well as similar lease requirements) would be unlawful. Indian tribes would not be able to enforce such ordinances or lease provisions with respect to employers doing business on or near their reservations – even if they are actually located on tribal lands. Such a dramatic effect on a fundamental principle of tribal sovereignty warrants this Court's review.

The need for review is particularly acute in this case. The Navajo Reservation, out of which this case arose, includes portions of four states: Arizona, New Mexico, Utah and Colorado. Thus, the Navajo Reservation encompasses territory in two circuits of the United States Court of Appeals (the Ninth and the Tenth Circuits). Conflicting resolutions of this issue between the two circuits would present a particularly unworkable situation for both the Navajo Nation, as well as employers attempting to do

business on the Navajo Reservation, caught between tribal law and the Ninth Circuit's erroneous decision.

II. The Ninth Circuit Decision Creates a Conflict With the Indian Self-Determination and Education Assistance Act.

This Court's review is also necessary to address a significant conflict the Ninth Circuit's decision creates between two important federal statutes. The Ninth Circuit concedes that, under its interpretation of the Indian preference exemption in § 703(i), "a conflict between Title VII and ISDA may arise when a private employer is hired pursuant to the ISDA." (App., *infra*, 17a (n.15)). That conflict exists because Congress expressly provided that tribal-affiliation preferences in a tribe's "employment or contract preference laws . . . shall govern" an employer operating pursuant to a self-determination contract, 25 U.S.C. § 450e(c), yet (under the Ninth Circuit's interpretation) such tribal laws violate Title VII and are therefore unenforceable.

Although the Ninth Circuit acknowledges that, under its interpretation, "a conflict between Title VII and ISDA may arise when a private employer is hired pursuant to the ISDA," it expressly makes "no attempt to resolve it." (App., *infra*, 17a (n.15)). Resolution of the conflict between federal statutes which the Ninth Circuit's erroneous decision creates warrants this Court's review.

III. The Ninth Circuit Decision Is Contrary to This Court's Well-Established Indian Law and Racial Discrimination Precedents.

This Court has not specifically addressed whether § 703(i) permits preferences based on tribal affiliation. Nor has it considered whether such preferences are based on political distinctions, not race or national origin, and are therefore beyond the scope of Title VII's prohibitions altogether. However, this Court's prior Indian law and racial discrimination decisions establish several important principles that govern this case. Review is necessary because the Ninth Circuit decision violates (and in some respects, altogether ignores) this Court's precedents, and therefore arrived at erroneous conclusions.

A. The Ninth Circuit Decision Ignores the Relevant Analytical Framework.

In a case such as this, involving statutory interpretation, a court's task is to ascertain the intent of Congress and give effect to it. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570, 102 S.Ct. 3245, 3250 (1982) ("Our task is to give effect to the will of Congress."). However, "the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 2403 (1985). Instead, this Court has established a distinct analytical framework that applies when federal legislation raises issues of tribal sovereignty, self-governance or Indian law generally. Explaining the need for this distinct analysis, the Court stated:

> [T]raditional notions of Indian self-government are so deeply engrained in our jurisprudence

> that they have provided an important "backdrop" *against which vague or ambiguous federal enactments must always be measured.*
>
> . . . Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44, 100 S.Ct. 2578, 2583-84 (1980) (citation omitted; emphasis added); *see also Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 766, 105 S.Ct. at 2403 ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit").

In this case, the Ninth Circuit completely ignored the analytical framework this Court has established for deciding important issues of federal Indian law. Indeed, notwithstanding the substantial effect its decision has on tribal sovereignty, the Ninth Circuit erroneously viewed this case as though it were simply a Title VII discrimination case. It did not view Title VII's Indian preference exemption against the backdrop of tribal self-government, and it did not resolve any ambiguity in that provision in favor of tribal sovereignty. In fact, nowhere in its decision did the Ninth Circuit address the effect of its decision on tribal sovereignty and self-governance at all. To the contrary, the Ninth Circuit went so far as expressly stating: "Native Americans' interests in self-governance [are] interests not present in this case." (App., *infra*, 8a).

Because it failed to use the required analytical framework, the Ninth Circuit misidentified Congress' underlying purpose in enacting the Indian preference exemption

in § 703(i). It erroneously concluded that Congress' purpose was "to compensate for the effects of past and present unjust treatment" of Indians. (App., *infra*, 12a). In stark contrast to the Ninth Circuit's conclusion, this Court, in *Morton v. Mancari*, characterized the purpose underlying Congress' enactment of § 703(i) (as well as the provision exempting tribes from Title VII's definition of "employer," § 701(b)), as follows:

> This exemption reveals a clear congressional recognition, within the framework of Title VII, of the *unique legal status of tribal and reservation-based activities*. The Senate sponsor, Senator Humphrey, stated on the floor by way of explanation:
>
> > "This exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the *special legal position of Indians.*" . . .
>
> . . . .
>
> . . . These 1964 exemptions as to private employment indicate Congress' recognition of the longstanding federal policy of providing a *unique status to Indians in matters concerning tribal or "on or near" reservation employment*. The exemptions reveal a clear congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed.

417 U.S. at 545-46, 548, 94 S.Ct. at 2480-81 (emphasis added) (quoting 110 Cong. Rec. 12723 (1964)); *see also* 110 Cong. Rec. 13702 (1964) (commenting on both of Title VII's Indian exemptions, Senator Mundt asserted they

would "assure our American Indians of the continued right to protect and promote their own interests. . . . ").

Thus, the fundamental purpose of § 703(i) – like that of the many other Indian employment preference laws Congress has enacted since 1934 – is to assist "Indian tribes . . . to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. at 542, 94 S.Ct. at 2479. That purpose is consistent with the "firm federal policy of promoting tribal self-sufficiency and economic development" which this Court has "repeatedly recognized" in the Indian legislation Congress has enacted over many decades. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, 100 S.Ct. 2578, 2583-84 (1980).

The Ninth Circuit ignored *Morton v. Mancari*'s characterization of Congress' intent. Although it acknowledged the Salt River Project's reliance on the above-quoted language, the Ninth Circuit merely stated – without explanation – that *Morton v. Mancari* "does not support [the Salt River Project's] position." (App., *infra*, 12a-13a).

The Ninth Circuit compounded its error when it relied on its erroneous characterization of Congress' intent to justify ignoring Congress' recent express endorsement of employment preferences based on tribal affiliation in the context of the ISDA. It concluded that Congress' action with respect to the ISDA "provides no support" for the proposition that such preferences are also permitted under the exemption in § 703(i), because "the ISDA and Title VII have fundamentally different purposes." (App., *infra*, 14a-15a).

The Ninth Circuit's comparison of the underlying purposes of the ISDA and Title VII misses the point. Congress did not enact the Indian preference exemption in § 703(i) to further the anti-discrimination purposes of Title VII. Section 703(i) is, after all, an *exemption* from Title VII. Instead, legislative history makes it clear that Congress included the Indian preference exemption to promote tribal sovereignty and self-governance, in recognition of the "unique legal status of tribal and reservation-based activities." *Morton v. Mancari*, 417 U.S. at 545-46, 94 S.Ct. at 2480 (1974) (citing 110 Cong. Rec. 12723 (1964) (Sen. Humphrey)).

Thus, contrary to Judge Reinhardt's statement in the decision below, Title VII's two Indian exemptions and the ISDA have the same fundamental purpose. Significantly, just three weeks after Judge Reinhardt issued his opinion in this case, another panel in the Ninth Circuit stated that the ISDA and the Indian exemption in Title VII related to tribes (§ 701(b)) share the same underlying purpose:

> Congress sought to achieve *essentially the same goal* when it enacted the ISDEAA as when it excluded "tribes" from the operation of Title VII. Both the ISDEAA and the Title VII "tribe" exemption attempt to aid tribal entities in their efforts *to conduct their own affairs and economic activities with as much autonomy as possible.*

Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185, 1188-89 (9th Cir. 1998) (emphasis added).

The Ninth Circuit further compounded its error in failing to use the required analytical framework by adopting the EEOC's policy statement notwithstanding

recent changes to the law on which it is based. When the EEOC issued its policy statement in 1988, it relied heavily on regulations issued by the Department of the Interior and the Office of Federal Contract Compliance Programs (OFCCP). Since then, the Department of the Interior and the OFCCP's regulations on which the EEOC relied have been effectively negated.

The EEOC's policy statement expressly acknowledges that the Department of the Interior's regulations on which it relied "govern[ed] the implementation" of the ISDA's employment preference provision (25 U.S.C. § 450e). Obviously, after Congress expressly endorsed employment preferences based on tribal affiliation in connection with the 1994 amendments to the ISDA, Interior's regulations could no longer be valid. Not surprisingly, therefore, shortly after the 1994 amendments, the Department of the Interior's regulation on which the EEOC had relied was eliminated altogether. 60 Fed. Reg. 30791-92 (Jun. 12, 1995) (removing, among others, 48 C.F.R. § 1404.7000 *et seq.*). Although the other sections of Interior's regulations cited in the EEOC's policy statement (48 C.F.R. §§ 1452.204-71 and -72 (now redesignated as §§ 1452.226-70 and -71, *see* 60 Fed. Reg. 53280 (Nov. 13, 1995)) are still in the Code of Federal Regulations, they begin with: "As prescribed in 1404.7003(a) . . . " and "As prescribed in 1404.7003(b) . . . ," which sections no longer exist.

Similarly, although the OFCCP regulation on which the EEOC relied (41 C.F.R. § 60-1.5(a)(6)) is still in the Code of Federal Regulations, it is also effectively negated. When that regulation was promulgated in 1977, the

Department of Labor expressed the belief that its regulations "are consistent with . . . the Indian Self Determination and Education Assistance Act which also covers the preferential employment of Indians by certain Federal contractors," and "are fully compatible with" the ISDA. 42 Fed. Reg. 3455 (Jan. 18, 1977) (citation omitted). Again, in light of the 1994 amendments to the ISDA, the OFCCP regulations are clearly not "consistent" or "compatible with" the ISDA. *See* Limas, *Sovereignty as a Bar to Enforcement of Executive Order No. 11,246 in Federal Contracts with Native American Tribes*, 26 N.M.L. Rev. 257, 286 (1996) ("Congress' action in recognizing tribal preference laws in self-determination contracts reinforces the Congressional policy of tribal self-determination. OFCCP regulations reject tribal preference laws; thus, they run counter to federal policy and congressional intent.").

Accordingly, the 1994 amendments to the ISDA eliminate the foundation on which the EEOC's policy statement was built. There no longer is valid authority to support the EEOC's 1988 position. These changes have led some scholars to question "whether the EEOC will continue to take the position that preference based on tribal affiliation by a qualified employer violates Title VII." Buffalo & Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. Memphis L. Rev. 1365, 1374-75 (1995). Although the EEOC asserted in an amicus brief filed in the Ninth Circuit that its position on this issue is unchanged, it clearly does so without the benefit of the authority on which it earlier relied.

Since the EEOC adopted its policy statement in 1988, Congress has unambiguously clarified its position with

respect to tribal-based employment preferences. Furthermore, the regulations on which the EEOC relied no longer support its conclusion. The Ninth Circuit's published decision erroneously ignored these recent developments as having "little if anything to do" with its task of construing the Indian employment preference exemption in § 703(i). (App., *infra*, 15a).

Thus, the Ninth Circuit's published decision ignores this Court's precedents when it mischaracterizes Congress' underlying intent and fails to construe § 703(i) consistent with its purpose of promoting tribal sovereignty and self-governance. This Court should grant the petition in order to correct this important error.

B. The Ninth Circuit Decision Creates an Apparent Conflict With *Morton v. Mancari*.

The Ninth Circuit decision also mischaracterizes and fails to comply with the principles this Court established in *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474 (1974). In that case, the Court rejected a constitutional challenge to Indian preference legislation brought by non-Indians, concluding that such preferences are politically, not racially, based:

> Literally every piece of legislation dealing with Indian tribes and reservations . . . single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn

> commitment of the Government toward the Indians would be jeopardized.
>
> . . . .
>
> Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. . . . The preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be "an Inhabitant of that State for which he shall be chosen," . . . or that a member of a city council reside within the city governed by the council. . . . *The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities.* . . .

Id. at 552-54, 94 S.Ct. at 2483-84 (emphasis added). Thus, because the preference was political and not racial, the Court held it was subject to the rational basis test and could survive a due process challenge merely by being reasonably related to a legitimate governmental purpose. *Id.* at 554-55, 94 S.Ct. at 2484-85.

Although *Morton v. Mancari* did not deal with the precise issue in this case, the principles it established clearly apply here. If preferences to Indians over non-Indians are political distinctions because Indians are members of "quasi-sovereign entities," then distinctions among Indians based on their membership in one of these "quasi-sovereign entities" is even more clearly a political distinction. Thus, employment preferences based on

tribal affiliation are beyond the scope of Title VII's general prohibitions altogether.

Despite the unequivocal statement in *Morton v. Mancari* that "this preference . . . is not even a 'racial' preference," the Ninth Circuit erroneously characterized *Morton v. Mancari* as holding "that the employment preference at issue, though based on a racial classification, did not violate the Due Process clause because there was a legitimate non-racial purpose underlying the preference." (App., *infra*, 8a). If the Ninth Circuit were correct that Indian preferences are racial or national origin distinctions, then such preferences would be subject to strict scrutiny (not the rational basis test this Court applied) no matter how well intentioned the underlying "non-racial purpose" might be. *See Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 1914 (1988) ("Classifications based on race or national origin . . . are given the most exacting scrutiny."); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S.Ct. 2097 (1995) (holding that all government classifications based on race, even if well-intentioned, are subject to strict scrutiny). Thus, the petition for certiorari should be granted to resolve the apparent conflict between the Ninth Circuit's decision and the principles this Court announced in *Morton v. Mancari*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Harold DAWAVENDEWA, a single man, Plaintiff-Appellant,

v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Arizona corporation, Defendant-Appellee.

No. 97-15803.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 11, 1998.
Decided Sept. 14, 1998.

Bradley H. Schleier, Schleier Law Offices, Phoenix, Arizona, for plaintiff-appellant.

John J. Egbert, Jennings, Strouss & Salmon, Phoenix, Arizona, for defendant-appellee.

Robert J. Gregory, Equal Employment Opportunity Commission, Washington, D.C., for amicus curiae.

Appeal from the United States District Court for the District of Arizona; Stephen M. McNamee, District Judge, Presiding. D.C. No. CV-96-01165-SMM.

Before: CHOY and REINHARDT, Circuit Judges, and RESTANI, International Court of Trade Judge.*

REINHARDT, Circuit Judge:

Harold Dawavendewa, a Native American, alleges that because he is a Hopi and not a Navajo, he was not

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*The Honorable Jane A. Restani, International Court of Trade Judge, sitting by designation.

considered for a position with a private employer operating a facility on the Navajo reservation. He contends that the employer's conduct constitutes unlawful employment discrimination under Title VII of the Civil Rights Act of 1964. To determine whether Dawavendewa's Title VII complaint may proceed, we address, first, whether discrimination based on tribal affiliation constitutes "national origin" discrimination, and, second, whether such discrimination is permitted under a Title VII provision that allows preferential treatment of Indians in certain specified circumstances.[1]

Salt River Project Agricultural Improvement and Power District ("Salt River"), an Arizona corporation, entered into a lease agreement with the Navajo Nation in 1969. The agreement allows Salt River to operate a generating station on Navajo land provided that it, among other things, grants employment preferences to members of the Navajo tribe living on the reservation, or, if none are available, to other members of the Navajo tribe.[2] This

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[1] We use the terms Indian and Native American interchangeably throughout this opinion. While it is generally desirable for language to retain a fixed meaning, and while unnecessary changes in terminology exacerbate the problems we ordinarily have in understanding each other and in avoiding legal disputes, we recognize that the term Native American has become a part of the common parlance. Nevertheless, the statutes and opinions we examine use the term Indian, which was the appropriate word not so long ago.

[2] The employment provision reads as follows:

> Lessees agree to give preference in employment to qualified local Navajos, it being understood that "local Navajos" means members of the Navajo Tribe living on land within the jurisdiction of the Navajo

preference policy is consistent with Navajo tribal law. *See* 15 Navajo Nation Code § 604 (1995).

Dawavendewa, a member of the Hopi tribe, lives in Arizona less than three miles from the Navajo Reservation.[3] In 1991 he unsuccessfully applied for one of seven Operator Trainee positions at the Salt River generating station. He then filed a complaint alleging that Salt River was engaging in national origin discrimination in violation of Title VII. The complaint alleges that he took and passed a test for the position, ranking ninth out of the top twenty applicants, but was neither interviewed nor considered further for it because he was not a member of, or married to a member of, the Navajo Nation.

> Tribe. All unskilled labor shall be employed from "local Navajos," if available, providing that applicants for employment as unskilled laborers meet the general employment qualifications established by Lessees. Qualified semi-skilled and skilled labor shall be recruited and employed from among "local Navajos." In the event sufficient qualified unskilled, semi-skilled and skilled local Navajo labor is not available, or the quality of work of available skilled or semi-skilled workmen is not acceptable to Lessees, Lessees may then employ, in order of preference, first qualified non-local Navajos, and second, non-Navajos.

[3] We note that the Hopi and Navajo Tribes have been involved in a number of longstanding disputes. *See, e.g., Hopi Tribe v. Navajo Tribe*, 46 F.3d 908 (9th Cir.1995) (rental value of homesites and grazing rights due Hopi Tribe under Navajo-Hopi Settlement Act of 1974); *Masayesva v. Hale*, 118 F.3d 1371 (9th Cir.1997) (recovery of damages relating to use of jointly-held lands).

Salt River moved to dismiss the complaint on the grounds that discrimination on the basis of tribal membership (as opposed to discrimination on the basis of status as a Native American) does not constitute "national origin" discrimination and that Title VII expressly exempts tribal preferences under § 703(i), 42 U.S.C. § 2000e-2 (i) (the "Indian Preferences exemption"). The district court granted the motion to dismiss. It held that Title VII exempts tribal preference policies, and therefore found it unnecessary to decide whether discrimination on the basis of tribal membership constitutes national origin discrimination under Title VII. Dawavendewa appeals.

I.

We first address the issue whether discrimination on the basis of tribal membership constitutes "national origin" discrimination for purposes of Title VII. Title VII prohibits employers from discriminating on the basis of "race, color, religion, sex, or national origin." Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2 (a).[4] Although Title VII fails to define "national origin," we have observed that "the legislative history and the Supreme Court both recognize that 'national origin' includes the country of one's ancestors." *Pejic v. Hughes Helicopters,*

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[4] We note that claims of discrimination on the basis of one's status as a Native American are often brought as race discrimination claims, *see, e.g., Weahkee v. Perry,* 587 F.2d 1256 (D.C.Cir.1978), although they have also been brought as national origin claims, *see Perkins v. Lake County Dep't of Utilities,* 860 F.Supp. 1262 (1994).

Inc., 840 F.2d 667, 673 (9th Cir.1988); *see Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973) (noting that "[t]he term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came"). Further, the regulations implementing Title VII provide that discrimination on the basis of one's ancestor's "place of origin" – not *nation* of origin – is sufficient to come within the scope of the statute. *See* 29 C.F.R. § 1606.1.[5] Accordingly, a claim arises when discriminatory practices are based on the place in which one's ancestors lived.

Consistent with the regulations, we have held that the current political status of the nation or "place" at issue makes no difference for Title VII purposes. In *Pejic v. Hughes Helicopters, Inc.*, we considered the issue whether discrimination against Serbians constituted "national origin" discrimination. 840 F.2d 667, 673 (9th Cir.1988). The employer in *Pejic* contended that a Serbian employee could not bring a discrimination claim because Serbia as a nation had long been extinct. We rejected this argument and held that Serbians were a protected class:

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[5] The regulation provides:

> The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.

29 C.F.R. § 1606.1.

> Unless historical reality is ignored, the term "national origin" must include countries no longer in existence. . . . Given world history, Title VII cannot be read to limit "countries" to those with modern boundaries, or to require their existence for a certain time length before it will prohibit discrimination. Animus based on national origin can persist long after new political structures and boundaries are established.

Id. (citation omitted); *see Roach v. Dresser Indus. Valve & Instr. Div.*, 494 F.Supp. 215, 218 (W.D.La.1980) (recognizing discrimination against "Cajuns" as national origin discrimination under Title VII although colony of Acadia no longer exists).

Under the principles set forth in *Pejic* and the Code of Federal Regulations, we have no trouble concluding that discrimination against Hopis constitutes national origin discrimination under Title VII. The status of Indian tribes among the international community and in relation to the United States has, of course, a complicated history that cannot be summarized briefly, and we will not attempt to do so. It is elementary, however, that the different tribes were at one time considered to be nations by the [sic] both the colonizing countries and later the United States. *See* William C. Canby, Jr., *American Indian Law* 68 (1998). In 1832 Chief Justice Marshall wrote:

> The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial. . . .

> The Cherokee nation, then is a distinct community, occupying its own territory, with boundaries accurately described. . . .

Worcester v. State of Georgia, 1832, 31 U.S. (6 Pet.) 515, 559-61, 8 L.Ed. 483. The Court has in more recent times recognized the erosion of the Indian tribes' "nation" status. *See Organized Village of Kake v. Egan*, 369 U.S. 60, 72, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962) (Frankfurter, J.) (noting that "[b]y 1880 the Court no longer viewed reservations as distinct nations"). Currently, the different Indian tribes are generally treated as domestic dependent nations that retain limited powers of sovereignty. *See* William C. Canby, *American Indian Law* 72-87 (1998).

Because the different Indian tribes were at one time considered nations, and indeed still are to a certain extent, discrimination on the basis of tribal affiliation can give rise to a "national origin" claim under Title VII. The fact that "new political structures and boundaries" now exist has no significance. Further, even if the various tribes never enjoyed formal "nation" status, Section 1606.1 of the regulations makes clear that discrimination based on one's ancestor's "place of origin" is sufficient to state a cause of action. Accordingly, under the case law and the regulations interpreting Title VII, tribal affiliation easily falls within the definition of "national origin."

Salt River does not contend that the different Indian tribes are not "nations" for Title VII purposes. Rather, it relies on *Morton v. Mancari*, 417 U.S. 535, 552-554, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) for the proposition that employment preferences based on tribal affiliation are based on *political affiliation* rather than national origin and are thus outside the realm of Title VII. *Morton* involved a

Due Process challenge to the Bureau of Indian Affair's policy hiring Indian applicants over non-Indian applicants. The Court found that the policy did not constitute an impermissible racial classification because it was "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Id.* at 554, 94 S.Ct. 2474. However, *Morton* did not involve a claim of discrimination on the basis of membership in a particular tribe. In fact, in *Morton* no claim was made of *any* violation of Title VII. *Morton* simply held that the employment preference at issue, though based on a racial classification, did not violate the Due Process clause because there was a legitimate non-racial purpose underlying the preference: the unique interest the Bureau of Indian Affairs had in employing Native Americans, or more generally, Native Americans' interests in self-governance – interests not present in this case. For these reasons, *Morton* does not affect our conclusion that discrimination in employment on the basis of membership in a particular tribe constitutes national origin discrimination.[6] We therefore

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[6] For similar reasons, this circuit's holding in *Alaska Chapter, Associated Gen. Contractors of Am. v. Pierce*, 694 F.2d 1162 (9th Cir.1982), does not affect our conclusion. *Alaska Chapter* involved an equal protection challenge to a Department of Housing and Urban Development regulation that directs Indian Housing Authorities to give contracting preferences to Indian-owned businesses. That regulation, like the BIA's policy in *Morton* made no distinctions based on tribal affiliation. The court, relying on *Morton*, upheld that regulation on the ground that "[e]ncouraging and assisting Indian-owned businesses helps develop [leadership skills] and furthers the government's trust obligation to help the Indians develop economic self-

conclude that differential employment treatment based on tribal affiliation is actionable as "national origin" discrimination under Title VII.

II.

We now consider whether Salt River's policy of favoring members of the Navajo tribe falls within the exception provided by 42 U.S.C. § 2000e-2(i) (the "Indian Preferences exemption").[7] The Indian Preferences exemption states that

> [n]othing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which preferential treatment is given to any individual *because he is an Indian living on or near a reservation.*

42 U.S.C. § 2000(e)(2)(i) (emphasis added). Salt River maintains that its preferential treatment of Navajos is exempt from Title VII liability under this provision.

The issue whether the Indian Preferences exemption covers preferences on the basis of tribal affiliation has not been decided by the federal courts. The EEOC, however, addressed this precise issue in a 1988 Policy Statement. It

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sufficiency." *Id.* at 1170. *Alaska Chapter* involved an employment preference that was directly authorized by the Indian Self-Determination Act, which, as discussed below, was enacted directly for the furtherance of Native American self-governance.

[7] We note that the Indian tribes themselves are exempt from Title VII liability under § 701(b).

concluded that the "extension of an employment preference on the basis of tribal affiliation is in conflict with and violates Section 703(i) of Title VII." *Policy Statement on Indian Preference Under Title VII,* Fair Empl. Prac. (BNA) 405:6647, 6653 (May 16, 1988). The Commission based its conclusion on three grounds. First, it interpreted the language of the exemption, which applies to preferential treatment towards "any individual because he is an Indian living on or near a reservation," as evidencing Congressional intent to disallow tribal distinctions and "to encourage the extension of employment opportunities to Indians generally." Fair Empl. Prac. 405:6654. It then considered two federal regulations, one issued by the Department of Labor, and the other by the Department of Interior, both of which specifically forbid federal contractors from discriminating on the basis of tribal affiliation as a part of general Indian preference policies. *See id.* (discussing 41 C.F.R. § 60-1.5(a)(6) (1987) and 48 C.F.R. § 1452.204-71 (1987)).[8] Finally, the Commission reasoned that the allowance of tribal preferences could result in inequities in cases in which employers are situated near the reservations of two tribes or near a reservation shared by more than one tribe. *Id.* The EEOC, which has filed an amicus brief on this appeal, adheres to the position it adopted in the 1988 Policy Statement.

Generally, EEOC Guidelines are entitled to some deference. *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). The level of deference,

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[8] The Department of Interior regulation was implemented pursuant to the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450e(b).

however, depends on the EEOC's thoroughness of consideration, validity of its reasoning, consistency with earlier and later pronouncements, and power of persuasion. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991).[9] "Ultimately, EEOC statements of policy 'should always be considered, but they should not be regarded as conclusive unless reason and statutory interpretation support their conclusion.' " *Yerdon v. Henry*, 91 F.3d 370, 376 (2nd Cir.1996) (internal citations omitted). We give the EEOC's Policy Statement due weight, and for reasons we make clear in the discussion which follows, we agree with its conclusion that the Indian Preferences exemption does not allow discrimination based on tribal affiliation.

We now examine the language and purpose of the statutory exemption. The exemption applies to "preferential treatment . . . given to any individual *because he is an Indian* living on or near a reservation." § 2000e-2 (i) (emphasis added). The term "Indian" is generally used to draw a distinction between Native Americans and all others. *See Perkins v. Lake County Dep't of Utilities*, 860 F.Supp. 1262, 1274 (N.D.Ohio 1994) (citing *Felix S. Cohen's Handbook of Federal Indian Law* 2 (1971)). An employment practice of giving preference to members of a particular tribe does not afford preference to an applicant "because he is an Indian," but rather because he is a member of "a

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[9] A cynic might suggest that how much deference we give to an EEOC Guideline depends on how much we agree with it, or even that we apply the Commission's Guidelines when we think they're right and don't when we think they're wrong. That's surely not what the Court intended in *Arabian Am. Oil Co.*, however.

particular tribe." Such a preference is not consistent with the objectives of the Indian Preferences exemption. While the statute exempts the hiring of Indians from the force of the anti-discrimination in employment provisions, it does so in order to compensate for the effects of past and present unjust treatment, not in order to authorize another form of discrimination against particular groups of Indians – tribal discrimination. It seems evident that, under the exemption, favored treatment could not be given to Indian males at the expense of Indian women, or to Indians of mixed blood in derogation of the rights of those who are entirely of Indian ancestry. The purpose of the Indian Preferences exemption is to authorize an employer to grant preferences to *all* Indians (who live on or near a reservation) – to permit the favoring of Indians over *non*-Indians. The exemption is not designed to permit employers to favor members of one Indian tribe over another, let alone to favor them over all other Indians. To so read the provision would be to immunize two forms of discrimination not just one – discrimination on account of Indian status and discrimination on account of tribal membership. The statute on its face reaches only the former. In short, we read the term "because he is an Indian" to mean precisely what it says. The reason for the hiring must be because the person is an Indian, not because he is a Navajo, a male Indian, or a member of any other formal subset of the favored class.

Salt River contends, however, that allowing tribal preferences would be "consistent with" the congressional intent underlying the Indian Preferences exemption provision. Its argument rests primarily on language from *Morton*, which, as discussed above, does not support its

position. Indeed, Salt River can point to no legislative history that supports its reading of the Indian Preferences exemption.[10]

Instead, Salt River and the district court decision rely heavily on the 1994 amendments to the Indian Self-Determination and Education Assistance Act (ISDA). The ISDA, originally enacted in 1975, allows tribes to contract with the Departments of the Interior and Health and Human Services to administer programs otherwise administered by those Departments ("self-determination contracts") in order to establish

> a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

25 U.S.C. § 450(a)(b) (Supp.1998); *State of Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286, 1299 (9th Cir.1996) ("as expressed by the Self-Determination Act, Indian self-determination

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[10] The legislative history on this exemption is sparse. The EEOC points to general language that suggests that the Indian Preferences exemption was a means to combat the general problem of Indian unemployment on or near reservations rather than to promote the strength of individual tribes. *See Morton v. Mancari*, 417 U.S. 535, 545-46, 94 S.Ct. 2474, 41 L.Ed.2d 290 (quoting Remarks of Senator Humphrey, 110 Cong. Rec. 12723) (1964) ("This exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians"). We generally find the legislative history to be inconclusive and do not rely on it.

involves increased participation of Native Americans in the administration of federal programs"), *rev'd on other grounds, Alaska v. Native Village of Venetie Tribal Gov't*, ___ U.S. ___, 118 S.Ct. 948, 140 L.Ed.2d 30 (Feb. 25, 1998); *Pierce*, 694 F.2d at 1170 (noting that purposes of the Indian Self-Determination Act is to develop leadership skills as well as economic self-sufficiency). One subsection of the ISDA, § 450(b)(1), provides that contracts under the chapter must require that preferences be "given to Indians" with respect to training and employment opportunities. The 1994 Amendment provided that *despite* subsection 450(b)(1), "tribal employment or contract preference law adopted by such tribe will govern" with respect to self-determination contracts.[11]

The 1994 Amendment provides no support for Salt River's argument that Congress intended the Indian Preferences exemption to cover discrimination based on tribal affiliation. First, whatever Congress decided to do with

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[11] The amendment provides in full:

> Notwithstanding subsections (a) and (b) of this section, with respect to any self-determination contract, or portion of a self-determination contract, that is intended to benefit one tribe, the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of the contract.

25 U.S.C. § 450(c) (Supp.1998).

The 1994 Amendment was passed in response to a proposed regulation interpreting the ISDA to require preferences to Indians "regardless of tribal affiliation." 59 Fed.Reg. 3166, 3185 (Jan. 20, 1994).

respect to amending the ISDA in 1994 has little if anything to do with what it intended when it drafted Title VII thirty years earlier. Second, the ISDA and Title VII have fundamentally different purposes that make the analogy Salt River seeks to draw of little value: While Title VII provides relief for individual cases of discrimination by employers, the purpose of ISDA is to shift control of certain federal programs and services that benefit particular tribes to the tribes themselves. Third, the ISDA governs a very limited set of employment situations – those arising pursuant to particular contracts between tribes and two departments within the federal government. 25 U.S.C. § 450b(j); *see FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1234 (8th Cir.1995) (holding that, by definition, private parties cannot enter self-determination contracts). Salt River is unquestionably not an employer acting pursuant to a self-determination contract subject to the ISDA. Accordingly, we conclude that the tribal preferences exception contained in the ISDA does not support Salt River's interpretation of the Indian Preferences exemption.

To the contrary, we find that the recent amendment to the ISDA supports the EEOC's position. The fact that Congress felt the need to pass the 1994 Amendment only bolsters the contention that general Indian preference policies were not intended to allow distinctions among different tribes. When Congress decided that tribal affiliation preferences were appropriate in the context of self-determination contracts, it responded through the

enactment of the 1994 Amendment.[12] It has passed no similar amendment with respect to Title VII. The fact that Congress now requires a narrowly-defined set of contracts to honor local tribal preference policies not only fails to support the argument that it intended to accomplish that same objective in 1964 when passing Title VII, but it suggests quite the opposite proposition. It shows us that when Congress wishes to allow tribal preferences, it adopts an appropriate amendment to the applicable statute.[13]

Salt River's final argument is that subjecting Salt River to Title VII liability would "frustrate" the purposes of the ISDA as amended in 1994. There is, however, no conflict between allowing tribal preferences under a self-determination contract, the entire purpose of which is to promote the *self-governance* of a tribe through the administration of federal programs, and not allowing those preferences in other private employment situations. As already mentioned, there is no contention that the Salt River agreement falls within the scope of the ISDA and little argument that permitting discrimination against

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[12] There is no indication that the 1994 Amendment was merely a "clarifying" amendment. Indeed, the 1994 Amendment begins, "*Notwithstanding* subsections (a) and (b) of this section." Accordingly, Congress felt the need to indicate that *despite* the general Indian preference policy, tribal preference policies would apply.

[13] Salt River argues that the Policy Statement has lost persuasive value because one of the regulations on which it relies has been superseded by the 1994 Amendment. For the reasons just discussed, Congress' actions with respect to the ISDA and the revision of regulations pursuant to those actions does not affect our interpretation of the Title VII exemption.

Hopi Indians would help achieve the goals of the ISDA. Preferential employment of Navajo Indians on a privately-owned facility, while certainly helpful to the tribe's employment problems, has little to do with increasing the tribe's capacity for self-governance. Further, other federal regulations that provide for general Indian preferences in employment contexts explicitly disallow discrimination based on tribal affiliation. *See, e.g.*, 23 C.F.R. § 635.117(d) (1997) (employment by state highway agencies); 25 C.F.R. § 256.3(b) (1997) (participation in Housing Improvement Program of BIA).[14] We conclude that Congress' decision to permit tribal preferences under the ISDA is in no way frustrated by our construction of Title VII as precluding such preferences in other types of employment.[15]

Finally, we note the possible inequities that would arise in allowing tribal affiliation discrimination, particularly in areas where there are many different tribal reservations. Under Salt River's interpretation of the provision, any private employer situated near a Hopi *and* Navajo reservation could arbitrarily institute a blanket-

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[14] Salt River questions the continuing validity of these regulations in light of the 1994 Amendment. As discussed above, the 1994 Amendment only affected a particular set of employment situations. Congress simply has not instituted a blanket-approval of tribal preferences in the context of either federal employment or private employment.

[15] We do note, however, that a conflict between Title VII and ISDA may arise when a private employer is hired pursuant to the ISDA. Because this conflict does not arise here, we do no attempt to resolve it and limit our holding to employment situations that do not fall within the scope of 28 U.S.C. 450e(c).

policy of preferential treatment towards members of one or the other of the tribes. Further, private employers would have license to pass over those Native Americans who live on a particular reservation but who do not share the same tribal affiliation as the governing body of the reservation.[16] Without a clear indication to the contrary, this appears to be the sort of individual discrimination wholly within the scope of Title VII.

Based on our reading of the Indian Preferences exemption, and informed by the 1994 Amendment to the ISDA, we conclude that the exemption does not include preferences based on tribal affiliation. If Congress wishes to amend Title VII to accommodate tribal preferences, as it did with respect to the ISDA, it may do so. Because Congress has not yet chosen that course, and because there is no dispute that the Salt River policy constitutes a tribal preference policy, the district court erred in dismissing the complaint.

CONCLUSION

We conclude that Salt River's conduct as described in the complaint constitutes "national origin" discrimination under Title VII and does not fall within the scope of the Indian Preferences exemption. Accordingly, the district

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[16] *See Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 911 (9th Cir.1995) (noting "continued presence of Navajo Indians on 900,000 acres of the Hopi Reservation in northern Arizona").

court's Rule 12(b)(6) dismissal was improper, and we reverse.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

HAROLD DAWAVENDEWA, a single man, Plaintiff, v. SALT RIVER PROJECT ARGRICULTURAL [sic] IMPROVEMENT AND POWER DISTRICT, an Arizona corporation, Defendant.	CIV 96-1165-PHX-SMM **MEMORANDUM OF DECISION AND ORDER** (Filed Apr. 16, 1997)

Plaintiff, a member of the Hopi Nation, filed this action on May 13, 1996, pursuant to Title VII of the Civil Rights Act of 1968 [sic], 42 U.S.C. §§2000 *et seq.* Plaintiff alleges that Defendant Salt River Project Agricultural Improvement and Power District ("SRP") unlawfully discriminated against him by failing to hire him for a position with the Navajo Generating Station pursuant to a Navajo hiring preference provision of the SRP lease. Considered herein is Defendant's motion to dismiss filed on September 19, 1996 under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. STANDARD OF REVIEW

In deciding a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court must presume all factual allegations of the complaint to

be true. *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 27 n.2 (1977); *NL Indus. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Although the complaint is construed in the light most favorable to the plaintiff, legal conclusions couched as factual allegations, however, are not given a presumption of truthfulness. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

II. DISCUSSION

In 1969, Defendant SRP entered into a lease with the Navajo Nation pursuant to which Defendant operates the Navajo Generating Station located on the Navajo reservation. The lease provides that Defendant SRP as the lessee shall give employment preference to "local Navajos" meaning "members of the Navajo Tribe living on land within the jurisdiction of the Navajo Tribe." In the event that sufficient local Navajo labor is not available preference must then be given first to non-local Navajos, then to non-Navajos.

Plaintiff, a member of the Hopi Nation, lives less than three miles from the Navajo Reservation. Compl. at ¶11. In 1991, Plaintiff applied for one of seven advertised Operator Trainee positions at the Navajo Generating Station. *Id.* at ¶12. Plaintiff passed the test for the position, ranking ninth of the top 20 applicants. *Id.* at ¶¶13 & 14. However, when it was determined that Plaintiff was not a member of the Navajo Nation or married to a member, Plaintiff was given no further consideration for employment. *Id.* at ¶15.

On March 15, 1992, Plaintiff filed a charge with Equal Employment Opportunity Commission (EEOC) for

national origin discrimination in violation of Title VII. *Id.* at ¶19. On May 28, 1993, the EEOC issued a finding that Plaintiff had been discriminated against on the basis of national origin with regard to Defendant's failure to hire Plaintiff. *Id.* at ¶20. Plaintiff received a Notice of Right to Sue on February 15, 1996. *Id.* at ¶21.

Plaintiff brings this action on behalf of himself, and "all non-Navajo Native American individuals not hired by Defendant at the Navajo Generating Station by Defendant after January 21, 1992, and non-Navajo Native Americans who have been deterred from seeking employment with Defendant as a result of its discriminatory and illegal conduct." *Id.* at ¶22.

Defendant moves to dismiss this action on the bases that (1) Title VII expressly exempts Defendant's Navajo preference practice, (2) to find otherwise is inconsistent with Congressional intent to further tribal self-government, and (3) Navajo and non-Navajo are "political distinctions" outside the purview of a national origin claim. Plaintiff argues that whether a private corporation may discriminate among differing groups of Native Americans is an issue of first impression. Plaintiff contends that an affirmative decision is unsupported by the plain meaning of the language of Title VII and recent amendments to the Indian Self-Determination Act (ISDA), 25 U.S.C. § 450 *et seq.*, and contrary to the EEOC's position on the issue.

A. Title VII of the Civil Rights Act of 1968 [sic]

Title VII of the Civil Rights Act of 1964 prohibits discrimination in private employment on the basis of 'race, color, religion, sex, or national origin.' 42 U.S.C. § 2000e-2(a); *Morton v. Mancari*, 417 U.S. 535, 545, 94 S.Ct. 2474, 2480 (1974). Two sections of the Act, however, explicitly exempt preferential employment of Indians by Indian tribes or private industries located on or near Indian reservations. *See* 42 U.S.C. §§ 2000e(b) and 2000e-2i; *Morton*, 417 U.S. at 545, 94 S.Ct. at 2480. Section 701(b) exempts Indian tribes from the definition of an "employer". 42 U.S.C. § 2000e(b). Section 703(i) reads:

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

42 U.S.C. § 2000e-2(i). The exemptions reveal a clear congressional recognition of "the longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal or 'on or near' reservation employment." *Morton*, 417 U.S. at 548, 94 S.Ct. at 2482.

The issue of tribal preference as discriminatory under Title VII is one of first impression. The one context in which it has been addressed directly is an EEOC Policy Statement issued on May 16, 1988. The EEOC's Policy Statement on Indian Preference Under Title VII, effective May 16, 1988, opined that the extension of an employment preference on the basis of tribal affiliation violates

Section 703(i) of Title VII. Plaintiff argues that, the issue being one of first impression, the Court should give deference to the EEOC's interpretation of the scope of § 703(i) of Title VII.

Where a statute is silent or ambiguous as to a particular issue, the Court must first attempt to determine Congressional intent. *Almero v. INS*, 18 F.3d 757, 763 (9th Cir. 1994). Where this step fails, a court should adopt the agency's interpretation if reasonable. *Id.* In the Policy Statement, noting that Title VII is silent on the issue, the EEOC attempted to determine Congressional intent by looking to regulations prohibiting tribal affiliation discrimination promulgated by (1) the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor to promote and insure equal opportunity for all persons by federal contractors and subcontractors,[1] and (2) by the Department of the Interior implementing § 7(b) of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450e(b).[2]

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[1] The regulation reads in pertinent part:

> Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation . . .

41 C.F.R. § 60-1.5(a)(6) (1987).

[2] The regulations require the following provision to be inserted in specified contracts:

> The Contractor agrees to give preference to Indians who can perform the work required regardless of age (subject to existing laws and regulations), sec [sic], religion, or tribal affiliation for training and employment opportunities under this

The accuracy of the EEOC's determination of congressional intent is questionable in light of recent amendments to the regulations and statutes upon which it relied. First, in 1988, Congress amended the ISDA "to increase tribal participation through contracting in the management of Federal Indian programs and to help ensure long-term financial stability for tribally-run programs." 59 Fed. Reg. 3166 (1994). Included was a requirement that preferences be given to Indians in employment and training to the extent possible. *See* 25 U.S.C. § 450e(b). Then in October, 1994, Congress amended the ISDA to provide:

> Notwithstanding subsections (a) and (b), with respect to any self-determination contract, or portion of a self-determination contract, that is intended to benefit one tribe, the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of the contract.

25 U.S.C. § 450(c). In so amending, Congress rejected a proposed regulation implementing 25 U.S.C. § 450e(b) giving preference to Indians to the greatest extent possible *regardless of tribal affiliation. See* 59 Fed. Reg. 3185

> contract and, to extent feasible consistent with the efficient performance of this contract, training and employment preferences and opportunities shall be provided to Indians regardless of age (subject to existing laws and regulations), sex, religion, or tribal affiliation who are not fully qualified to perform under this contract.

See 48 C.F.R. § 1452.204-71.

(1994) (proposed Jan. 20, 1994) (emphasis added). Congress explained their intent to endorse tribal employment rights ordinances (TERO) over the general Indian preference established by the ISDA to resolve an ongoing tribal government conflict. *See* S.Rep. No. 374, 103d Cong., 2d Sess. 5 (1994).

Plaintiff argues that the amendments to the Indian Self-Determination Act permitting tribal affiliation preferences, although analogous, should not be broadened beyond the context of "self-determination contracts" specifically provided for within the ISDA. It is entirely appropriate for this Court to look toward the recent amendments in other Indian preference laws for guidance regarding congressional intent. *See Morton*, 417 U.S. at 548-9, 94 S.Ct. at 2481-82 (discussing the Indian preference laws set forth in the Education Amendments of 1972, 86 Stat. 235, 20 U.S.C. §§ 887c(a) and (d), and § 1119a (1970 ed., Supp. II), in finding that the preference provisions of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(b) and 2000e-2(i), were not impliedly repealed by the silence on the issue in the Equal Employment Opportunity Act of 1972). Moreover, failing to do so may result in determining a congressional intent of one statute that entirely frustrates that of another, impermissibly attributing "irrationality and arbitrariness" to the acts of Congress. *See Morton*, 417 U.S. at 548, 94 S.Ct. at 2481.

Plaintiff provides no authority, other than the now questionable EEOC opinion, for the proposition that § 703(i) should not encompass discrimination on the basis of tribal affiliation. In addition, Plaintiff fails to suggest how either the strong federal policy of promoting tribal self-government is not frustrated or, alternatively, what

congressional intent is instead furthered, by federal prohibition of the tribal affiliation employment preference on or near the respective tribe's reservation. The Court, therefore, finds that Title VII is not implicated by a provision of a lease granted by an Indian Tribe to a private company that requires a tribal preference in employment.

IV. CONCLUSION

The Court finds that consistent with the federal commitment toward promoting tribal self-government, § 703(i) includes tribal affiliation preferences in the context of employment on or near the respective Indian reservation as exempted from Title VII of the Civil Rights Act. In so holding the Court declines to decides [sic] whether "Indians" is always a political or racial classification. For the foregoing reasons,

IT IS THEREFORE ORDERED Defendant's Motion to Dismiss filed September 19, 1996 is **GRANTED.** [DOC. #5]

IT IS FURTHER ORDERED the Clerk of the Court shall enter judgment and terminate this action accordingly.

DATED this 15 day of April, 1997.

/s/ Stephen M. McNamee
Stephen M. McNamee
United States District Judge

Copies to all counsel of record

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAROLD DAWAVENDEWA, a single man, Plaintiff-Appellant, v. SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Arizona corporation, Defendant-Appellee.	No. 97-15803 D.C. No. CV-96-01165 **ORDER** (Filed Jan. 13, 1999)

Before: CHOY and REINHARDT, Circuit Judges, and RESTANI, International Court of Trade Judge.*

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Jane A. Restani, International Court of Trade Judge, sitting by designation.

upreme Court, U.S.
FILED
MAY 7 1999
CLERK

No. 98-1628

In The

Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

vs.

HAROLD DAWAVENDEWA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circut

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QUESTION PRESENTED

Whether a private employer's policy to give job preferences to prospective employees on the basis of membership in a particular Native American tribe violates the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*?

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Harold Dawavendewa ("Dawavendewa") respectfully requests that the Court deny the petition by Salt River Project Agricultural Improvement and Power District ("Salt River Project") for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. No Compelling Reason Exists For The Granting Of The Writ.

Supreme Court Rule 10 sets forth the limited circumstances in which this Court will exercise its discretionary powers in granting a petition for a writ of certiorari. As this case does not involve a conflict in the various circuit courts of appeals or a state court of last resort, Salt River Project must rely on the criterion set forth in Rule 10(c) to convince this Court to expend its time and resources on a very narrow issue of first impression. Specifically, Salt River Project must show that Dawavendewa's claim involves an "important question of federal law, that has not been, but should be settled by this Court." *See* Supreme Court Rule 10(c).

However, as demonstrated below, this Court should not grant the writ of certiorari in the present case for the following reasons:

1. The decision of the Ninth Circuit was a correct interpretation of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* [hereinafter "Title VII"] based, in a large part, on Justice Thomas' 1988 Policy Statement issued

when he was Chairman of the Equal Employment Opportunity Commission [hereinafter "EEOC"];

2. This is an issue of first impression decided by the Ninth Circuit which no other Circuit addressed;

3. There is no conflict between the Ninth Circuit's decision and the Indian Self Determination Act, 25 U.S.C. § 450 *et seq.* ["ISDA"] (in fact, the Ninth Circuit's decision completely conforms to the ISDA);

4. The only potential conflict between Title VII and the ISDA is merely theoretical and does not involve the facts of the present action;

5. The issues presented are "personal" to the parties and not sufficiently important to warrant this Court's intervention in light of the fact that no other decisions on this issue have been issued in the 35 years that Title VII has been law; and

6. The Ninth Circuit's conclusion that discrimination on the basis of tribal affiliation violates Title VII's protections against "national origin" discrimination does not conflict with this Court's decision in *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed. 290 (1974).

Because there is no compelling reason for this Court to exercise its jurisdiction, Salt River Project's petition for writ of certiorari should be denied.

II. The Ninth Circuit Correctly Applied Title VII Law To The Present Case.

Without arguing the merits of the issue decided by the Ninth Circuit, the Ninth Circuit's well-reasoned decision was clearly the correct and appropriate decision. Specifically, the Ninth Circuit's decision took into account

the underlying purpose of Title VII to protect individuals from discrimination, the affect and applicability of other laws dealing with the powers of Native American tribal nations, and the applicability of the EEOC's Policy Statement issued by then Chairman, now Justice, Clarence Thomas addressing the exact situation presented in this case.

One of the most significant considerations of the Ninth Circuit was the fact that the EEOC had directly addressed the issue presented in the case *sub judice.* Under Justice Thomas the EEOC issued a policy statement that directly supported Dawavendewa and the Ninth Circuit's reasoning. Specifically, in May 1988, the EEOC issued a policy statement that directly addressed the issue of whether discrimination based on tribal affiliation violated Title VII. On behalf of the Commission, Justice Thomas concluded:

> On this point, the Commission believes that, in enacting Section 703(i), Congress intended to encourage the extension of employment opportunities to Indians generally, without allowing discrimination among Indians of different tribes. Under Section 703(i), the exception applies to employment practices under which preferential treatment is given to "*any* individual because he is an Indian living on or near a reservation" (emphasis added). The statutory language supports the conclusion that Congress did not intend to permit tribal distinctions among Indians otherwise qualifying for such preferential treatment.
>
> Further, as a practical matter, the Commission notes that in some instances employers may be

> located on or near the reservation of only one tribe and that the Indians living on or near that reservation may be members of that tribe. Under such circumstances, the preferences may operate, in effect to favor only members of that specific tribe without disadvantaging Indians of other tribes. However, in some parts of the country employers are situated near the reservation of more than one tribe or more than one tribe may share the same reservation. The potential inequities resulting from according a preference based on tribal affiliations are most clearly evident when these circumstances are contemplated.
>
> In light of these considerations, it is the Commission's position that extension of an employment preference on the basis of tribal affiliation is in conflict with and violates Section 703(i) of Title VII. The Commission emphasizes, however, that its position with respect to Section 703(i) affects only employers covered by Title VII. Since Indian tribes are exempt from the provisions of Title VII under Section 701(b)(1), preferences or requirements based on tribal membership or affiliation imposed by a tribe with respect to its own employment practices are not violative of Title VII. *See Wardle v. Ute Indian Tribe*, 623 F.2d 670, 23 EPD ¶ 31,035 (10th Cir. 1980).

See Policy Statement on Indian Preference Under Title VII, Appendix 18-19.

The Ninth Circuit saw the wisdom of Justice Thomas' reasoning from a decade earlier and found no support of

a claim that the sound legal basis supporting his conclusion had changed in the decade following the issuance of the EEOC's Policy Statement.[1]

As the Ninth Circuit gave full consideration to all of the issues presented and decided them correctly, there is no compelling reason for this court to exercise its jurisdiction and grant the writ of certiorari.

III. The Ninth Circuit's Decision Stands Alone On This Issue And This Court's Involvement Is Therefore Not Warranted.

In reviewing the Ninth Circuit's decision, one thing is readily apparent. The present action was a case of first impression on this issue in the United States. To date, no other district court or circuit court of appeals has had the opportunity to address this issue. Because no dispute exists between the Ninth Circuit and any other court in the nation, the present case is not ripe for this Court to expend its limited time and resources. Consequently, Salt River Project's petition should be denied.

IV. No Dispute Exists Between The Ninth Circuit's Interpretation Of Title VII And The ISDA.

In requesting that this Court grant the writ of certiorari, Salt River Project argues that the Ninth Circuit's

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[1] Salt River Project contends that some of the regulations relied upon by the EEOC have either changed or been modified since the EEOC pronouncement. However, as demonstrated *infra*, the same considerations and reasoning utilized by Justice Thomas are still viable today.

decision creates a fundamental conflict between Title VII and recent amendments to the ISDA. However, as noted in the Ninth Circuit's decision, the ISDA serves a different purpose than Title VII and, furthermore, the recent amendments to the ISDA **support** the position taken by Dawavendewa and the EEOC. *See Dawavendewa v. Salt River Project Imp. And Power Dist.*, 154 F.3d 1117, 1123 (9th Cir. 1998) (P.App.[2] 15a). Moreover, recent amendments to the ISDA, other similar regulations, and the Ninth Circuit's decision collectively show a statutory scheme that provides appropriate protections of tribal sovereignty, yet does not permit private employers to engage in discrimination based on tribal affiliation.

Initially, as correctly noted by the Ninth Circuit, the purpose of the ISDA is completely different from Title VII. While the purpose of the ISDA is to shift control of certain federal programs to the tribal entities, Title VII provides relief to individual employees for discrimination. *See Dawavendewa, supra* at 1123 (P.App. 15a); 25 U.S.C. § 450 *et seq.; FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230 (8th Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996) (holding that ISDA provisions dealing with self-determination contracts **only** apply to contracts between tribes and federal government, and not a private party retained to work on projects funded by self-determination contracts). One of the primary purposes of the ISDA is to assist the various Native American tribal nations, while permitting them some sovereignty with regard to the

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[2] "P.App" refers to Petitioner's Appendix.

administration of federal programs.[3] *See* 25 U.S.C. § 450(a)(b); *State of Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286, 1299 (9th Cir. 1996), *rev'd on other grounds, Alaska v. Native Village of Venetie Tribal Gov't*, ___ U.S. ___, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998). Moreover, the employment provisions of the ISDA mirror the provisions of Title VII, the Ninth Circuit's decision, and the EEOC Policy Statement by permitting a general preference in the hiring of Native Americans and **only** permitting preferences on the basis of tribal affiliation when tribes are acting in a "quasi-governmental" function.

Specifically, 25 U.S.C. § 450e(b) of the ISDA provides that any contracts, subcontracts, or grants to Indian organizations for the benefit of Native Americans shall require that a preference for employment be given to Native Americans. In 1994, the ISDA was amended, however, and the amendment provides a very narrow situation where a **single** tribal nation receives and administers a "self-determination" contract from the federal government.[4] The newly added Section 450e(c) of the ISDA states:

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[3] The purpose of the legislation did not change with the 1994 amendment. Even though some portions of 25 U.S.C. § 450a were redrafted, the overriding purpose of the legislation did not change.

[4] "Self-determination" contracts involve situations where the federal government secedes control of certain federal government programs directly to the tribal nations for administration. *See* 25 U.S.C. § 450f.

> Notwithstanding subsections (a) and (b) of this section, **with respect to any self-determination contract, or portion of a self-determination contract**, preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of the contract. (emphasis added)

The amendment set forth the very limited circumstances in which a tribal nation can provide a preference to its own tribal members. As correctly recognized by the Ninth Circuit, tribal preferences under the ISDA are, therefore, only appropriate in the very limited situations in which a tribe is acting in a governmental capacity and administering a "self determination contract."[5] This interpretation is also in accord with Title VII's exemption of tribal nation governments from coverage under the statute. *See* 42 U.S.C. § 2000e-(b)(1).

Moreover, the Ninth Circuit's interpretation of Title VII and the ISDA will also avoid creating a direct conflict between Title VII, the ISDA, and other federal regulations which permit preferences to be given to Indians, generally, but do not permit preferences on the basis of tribal affiliation. *See* 23 C.F.R. § 635.117(d) (1998) (permits state highway agencies to provide preference to Native Americans living on or near a reservation, but such a preference should not take into account tribal affiliation); 48 C.F.R.

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[5] Obviously, if Congress believed that preferences based on tribal affiliation were appropriate for all governmental contracts under the ISDA, it could have amended the statute to include such language and not limit itself to the narrow circumstances involving "self determination contracts" as set forth in 25 U.S.C. § 450e(c).

§ 22.807(b)(4) (1998) (permits federal contractors to give preference to the employment of Indians living on or near reservation but employers may not discriminate among Indians on the basis of tribal affiliation); 25 C.F.R. § 256.3(b) (1998) (provides housing assistance to every Indian "regardless of tribal affiliation"); 48 C.F.R. § 352.270-2(a) (1998) (permits contractors with the Department of Health and Human Services permitted to provide preferences to Indians, but not on the basis of "tribal affiliations"); 48 C.F.R. § 1452.226-70(a) (1998) (permits contractors with the Department of Interior can provide preferences to Indians, but not on basis of tribal affiliation).

In further conformance with this interpretation are the regulations dealing with the Native American Housing Assistance and Self Determination Act of 1996 that permit Indian Tribes to grant tribal preferences in administering grants provided for a tribe's benefit. 62 Fed. Reg. 35718, 35739 (July 2, 1997). This regulation is consistent with the ability of a tribe to enforce tribal preference ordinances in the administration of self-determination contracts as set forth in § 450e(c) of the ISDA; both situations involve tribal governments acting in a quasi-governmental fashion relative to the administration of governmental programs.

Therefore, the Ninth Circuit's interpretation did not create a conflict between Title VII and the ISDA, but continued the already uniform interpretation of laws which permit preferences to Indians in general, and only permit tribal affiliation preferences in the very narrow circumstances in which tribes are acting in a quasi-governmental fashion. This distinction helps promote the

employment of Indians in general, yet also permits tribal nations to maintain their sovereignty in making employment decisions relating to governmental functions unfettered by statutory limitations.

V. Any Conflict Between The ISDA And Title VII Is Merely Theoretical.

Salt River Project argues that the Ninth Circuit recognized that there was a conflict between its interpretation of Title VII and the language of the ISDA. Specifically, Salt River Project refers to a footnote where the Ninth Circuit, in *dicta*, noted that a conflict "may" arise between the provisions; however, the Ninth Circuit did not address this theoretical conflict as it did not involve the case *sub judice*. *See Dawavendewa, supra* at 1124 n. 14; Petitioner's App. 17a.

Although a theoretical conflict may exist, it is not the basis for this Court taking an extraordinary step and exercising its jurisdiction. As this Court noted in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616 (1955)[6], this Court does not accept jurisdiction to satiate some intellectual curiosity. Specifically, this Court noted:

> A federal question raised by a petitioner may be 'of substance' in the sense that,

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[6] Though *Rice, supra* was decided prior to the effective date of Supreme Court Rule 10, the standards applicable to this Court's discretionary review were less "exacting" than today's need for a "compelling" reason and, therefore, are equally appropriate for the Court's consideration of the present petition.

> abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. (cites omitted) 'Special and important reasons' imply a reach to a problem beyond the academic or episodic.

The theoretical conflict that may exist between the ISDA and Title VII should not be the basis for granting the Salt River Project's petition, as the theoretical problem cited by the Ninth Circuit was merely *dicta* and did not involve the factual record before the Court. Consequently, Salt River Project's request that this Court grant certiorari should be denied.

VI. The Issues In The Present Action Are Not Sufficiently Important For This Court To Exercise Its Jurisdiction.

As Title VII celebrates its 35th anniversary, the present action, though interesting from an intellectual point of view, is quite unique and limited in scope. Moreover, even though the EEOC issued a policy statement on this exact issue over a decade ago, the present case is the first of its kind and there are no other reported cases on this issue.

In light of the 35 years that have passed since the passage of Title VII, the current situation can be seen as nothing more than an academic exercise involving a

singular episode.[7] This dispute can be seen as nothing more than "personal" to the parties to this action. In light of the teaching in *Rice, supra,* Salt River Project, therefore, cannot demonstrate that the present issue is sufficiently important for this Court to invest its limited time and resources. Consequently, Salt River Project's petition should be denied.

VII. There Is No Inherent Conflict Between The Ninth Circuit's Opinion And This Court's Opinion In *Morton v. Mancari.*

In its petition, Salt River Project devotes a significant portion of its brief attempting to demonstrate that there is a conflict between the Ninth Circuit's interpretation of the parameters of Title VII (in holding that discrimination based on tribal affiliation is discrimination based on national origin discrimination) and this Court's decision in *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). However, as recognized by the Ninth Circuit, there is no conflict between its decision and the *Morton* decision.

Specifically, the Ninth Circuit properly concluded that the issues presented differed significantly from *Morton, supra* and that the goals being promoted in that case differ significantly from the present case. The Ninth Circuit noted that *Morton* did not involve a claim involving a violation of Title VII, nor did the case involve a claim of

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[7] On a further note, a review of the locations of the various tribal nations demonstrates that there are only a few circumstances in which differing tribal nations share borders.

tribal affiliation discrimination. Unlike the present action, *Morton* was limited to circumstances in which the Bureau of Indian Affairs (BIA) provided preferences to Native Americans, generally, and specifically in hiring and promotion decisions. In light of the purpose of the BIA and its role in working with tribal governments on the administration of governmental programs relating to the tribes, this Court believed a general preference to Indians was appropriate to promote tribal self-governance. *Morton, supra* at 535-36. However, *Morton, supra* did not address or discuss discrimination by a private employer between members of separate tribal nations.

Salt River Project tries to expand the holding of *Morton* to apply to the present action by stating that the Ninth Circuit's ruling somehow impacts on tribal sovereignty. However, the Court has noted that tribal sovereignty is not absolute. Absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in very limited circumstances. *See Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 1409 (1997); *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245 (1981). Generally, tribes lack the "right of self governing every person within their limits except themselves." *See Montana, supra* citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209, 98 S.Ct. 1011, 1021 (1978). The inherent sovereign powers of a Native American tribe do not extend to the activities of non-members of the tribe. *Id.* at 565, 101 S.Ct. at 1258. As noted by *Montana*, tribal power is very limited:

> In addition to the power to punish tribal offenders, Indian tribes retain their inherent

> power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and so cannot survive without express congressional delegation.

Id. at 564, 101 S.Ct. 1257-58 (citation omitted). This Court, therefore, has recognized that tribal sovereignty is not as broad as Salt River Project argues.

Consequently, because there is no conflict between the Ninth Circuit's decision and this Court's decision in *Morton, supra,* this Court should not exercise its jurisdiction and grant Salt River Project's petition.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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EEOC: Policy Statement on Indian Preference Under Title VII

EEOC POLICY STATEMENT

Subject Matter

Section 703(i) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(i) (1982), provides an exception to Title VII's general nondiscrimination principles allowing certain employers under certain circumstances to exercise an employment preference in favor of American Indians.[1] That section provides as follows:

> Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

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[1] This policy statement does not extend to charges/complaints brought under either the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. § 621 *et seq.* (1982), or the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d) (1982), since, unlike Title VII, neither of those statutes contains an Indian preference exception. Additionally, neither the ADEA nor the EPA provides a jurisdictional exemption for Indian tribes as does Section 701(b)(1) of Title VII.

The statutory language makes it clear that an employer seeking to avail itself of the Indian preference exception must meet three conditions: (1) the employer must be located on or near an Indian reservation, (2) the employer's preference for Indians must be publicly announced, and (3) the individual to whom preferential treatment is accorded must be an Indian living on or near a reservation. Neither Section 703(i) nor any other section of the Act, however, defines the terms "Indian reservation" or "near."

Although the Commission has issued several decisions involving the jurisdictional exemption of Indian tribes under Section 701(b)(1) of Title VII,[2] its one published decision involving the Indian preference exception under Section 703(i) of the Act turned solely on the question of whether the employer had satisfied the public announcement requirement of that section. *See* Commission Decision No. 74-26, CCH EEOC Decisions (1983) ¶6398. Thus, the Commission did not have occasion in that case to address the statutory requirement of being "on or near an Indian reservation."

Because the Commission has received various requests from employers, Indian tribes, and state fair employment practices agencies for its interpretation of the "on or near" phrase and the applicability of the Indian preference exception and because the issue is an increasingly important one on which the Commission has not previously issued guidance, the Commission now

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[2] *See* Commission Decision No. 80-14, CCH EEOC Decisions (1983) ¶6823, and Commission Decision Nos. 85-6 and 85-7, CCH Empl. Prac. Guide ¶¶6847 and 6848, respectively.

delineates its position with respect to the exception provided in Section 703(i) of the Act. Specifically, the Commission addresses: (1) the definition of "Indian reservation" for Title VII purposes, (2) the meaning of the term "near," (3) the scope of the term "employment practice," and (4) the issue of whether a preference based on tribal affiliation conflicts with the provisions of Title VII.

Indian Reservation

The need to define the term "Indian reservation" within the meaning of Section 703(i) of Title VII arises in connection with the circumstances that exist in the state of Oklahoma. As has been brought to the Commission's attention, Oklahoma is the home of a large number of Indian tribes and many areas of the state contain high Native American populations, yet there are no longer any Indian reservations as such in Oklahoma.[3] Many employers in the state, however, are located in and around the sites of former reservations. Thus, the question presented is whether the Indian preference exception provided in Section 703(i) is available to such employers or whether applicability of that provision is dependent upon the present existence of an Indian reservation as the necessary base from which to measure whether the "on or near" requirement is met.

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[3] Prior to statehood in 1907, the area comprising present-day Oklahoma was Indian Territory. For a detailed discussion of the history of the land, see F. Cohen, *Handbook of Federal Indian Law* 770-75 (1982 ed.). *See also* S. Pevar, *The Rights of Indians and Tribes* 231-33 (Bantam ed. 1983).

The issue is one of first impression. As noted above, Title VII does not define the term "Indian reservation." Nor is there any indication in the legislative history of the Act of the meaning intended by Congress in its use of that term is section 703(i). Further, research has disclosed no court decision defining the term for Title VII purposes.

Before examining statutory use of the term outside the context of Title VII, we consider its ordinary meaning:

> The term "Indian reservation" originally had meant any land reserved from an Indian cession to the federal government regardless of the form of tenure. During the 1850's, the modern meaning of Indian reservation emerged, referring to land set aside under federal protection for the residence of Tribal Indians, regardless of origin.[4]

Although "Indian reservation" is the more commonly familiar term, the governing legal term for most jurisdictional purposes is "Indian country."[5]

Id. at 27.

The latter is defined at 18 U.S.C. § 1151 as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States

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[4] Cohen, *supra* note 3, at 34.

[5] *Id.* at 27.

> whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The definition in Section 1151 is controlling with respect to the applicability of federal criminal law in Indian country. While this definition relates specifically to determinations of federal criminal jurisdiction, the Supreme Court has noted that it is also applicable to questions of federal civil jurisdiction.[6] However, although Indian reservations are included in the statutory definition of Indian country, the term "Indian reservation" is not separately defined.[7]

Similarly, the terms "Indian reservation" or "reservation" appear but are undefined in numerous other federal statutes.[8] A review of Title 25 of the U.S. Code, which

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[6] *DeCocteau v. District County Court*, 420 U.S. 425 (1975). "While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." *Id.* at 427 n.2 (citations omitted).

[7] In determining whether a particular tract of land constitutes a reservation within the meaning of § 1151(a), courts have examined the history of the land in light of acts of Congress, rulings by the Department of the Interior, and prior judicial decisions bearing on its status. *See, e.g., United States v. John*, 437 U.S. 634 (1978); *Cheyenne-Arapaho Tribes v. State of Oklahoma*, 618 F.2d 665 (1980); and *Langley v. Ryder*, 602 F. Supp. 335 (W.D. La. 1985).

[8] *See, e.g.*, 16 U.S.C. §§ 796(2), 797(e); 25 U.S.C. §§ 33, 46, 155, 175, 176, 196, 200, 211, 231-233, 253, 262, 264, 279, 280, 283,

pertains specifically to Indians, has disclosed only three instances in which "reservation" is defined, although the term is used repeatedly throughout that title.[9] Of these three definitions, one relates specifically to an Indian tribe in Connecticut.[10] A second definition, which is of general application, is found in the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et seq.* Incorporating and expanding upon the definition of Indian country, that Act provides as follows:

> "[R]eservation" means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.

25 U.S.C. § 1903(10).

The third definition appears in the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.*, which provides Indian tribes and individuals capital in the form of loans and grants to promote economic development. That definition specifically includes former Indian reservations in Oklahoma. As defined therein:

286, 291, 292, 304, 307, 309, 311, 312, 318a-321, 331, 333, 334, 336, 337, 339, 340, 342, 344, 348, 350-352, 380, 381, 393, 396a, 397-399, 400a, 402a, 407, 415, 461, 463, 463e, 465, 467, 468, 476-479, 488, 501, 631, 1083, 1311, 1466, 1495, 1521; 43 U.S.C. §§ 149, 150, 851, 856, 868, 1195-1196.

[9] *See* citations to 25 U.S.C. *supra* note 8.

[10] *See* 25 U.S.C. § 1752 (Supp. III 1985).

> "Reservation" includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.].

25 U.S.C. § 1452(d).

While no statutory definition discovered other than that in the Indian Financing Act explicitly recognizes former Indian reservations in Oklahoma, they are included in the definition of "reservation" contained in various regulations promulgated by the Bureau of Indian Affairs (BIA) of the Department of the Interior. For example, in the regulations governing BIA's financial assistance and social services program, 25 C.F.R. § 20.1 *et seq.* (1987), the following definition is provided:

> "Reservation" means any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments.

25 C.F.R. § 20.1(v) (1987).[11]

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[11] The cited regulations were issued under 25 U.S.C. § 13, which authorizes BIA to expend money appropriated by Congress for the benefit, care, and assistance of Indians. For other instances in which BIA regulations define "reservation" as including former Indian reservations in Oklahoma, see 25 C.F.R. §§ 101.1(k) (loans to Indians from revolving loan fund), 103.1(h) (loan guaranty, insurance, and interest subsidy), 151.2(f) (land acquisitions), 273.2(o) (education contracts under Johnson

Against this background, the Commission must determine the meaning of the term "Indian reservation" under section 703(i) of Title VII. In so doing, the commission is mindful that Title VII is remedial social legislation and is, therefore, entitled to liberal construction in order to effectuate the purpose of the Act.[12] The purpose for the inclusion of Section 703(i) is explained in the legislative history:

> A new subsection 703(i) has been added permitting enterprises on or near Indian reservations to follow preferential hiring practices toward Indians. This exemption is consistent with the Federal government's policy of encouraging

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O'Malley act), and 286.1(j) (Indian business development program).

A similar definition is provided in regulations of the Department of the Interior (implementing Section 7(b) of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e(b)), at 48 C.F.R. § 1404.7001 (1987). That section provides:

> "Indian reservation" includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601 et seq.).

[12] *See EEOC v. First Catholic Slovak Ladies Association*, 694 F.2d 1068, 1070, 30 EPD ¶ 33,175 [30 FEP Cases 819] (6th Cir.), *cert. denied*, 464 U.S. 819, 32 EPD ¶ 33,829 [32 FEP Cases 1672] (1983); and *Zimmerman v. North American Signal Company*, 704 F.2d 347, 352, 31 EPD ¶ 33,486 [31 FEP Cases 634] (7th Cir. 1983).

Indian employment and with the special legal position of Indians.[13]

In the Commission's view, the Congressional purpose of encouraging the voluntary extension of employment opportunities to Indians would be unduly hampered by narrowly defining the term "Indian reservations" within the meaning of Section 703(i) to exclude former Indian reservations in Oklahoma. Such a definition would effectively preclude the applicability of Title VII's Indian preference provision to employers in a state which was originally Indian Territory and whose present population includes a high percentage of Native Americans, a result which appears contrary to the intent of section 703(i). Additionally, the Commission takes note that a narrow definition of that term would similarly render the preference inapplicable in the state of Alaska.[14]

In light of these considerations, the Commission believes that the purpose of section 703(i) would be furthered by defining "Indian reservation" in a manner that accords special recognition to the circumstances that exist in both Oklahoma and Alaska. Therefore, guided by the definitions of "reservation" provided in the Indian Financing Act of 1974 and in regulations issued by the Bureau of Indian Affairs,[15] it is the Commission's position that the terms "Indian reservation" and "reservation" in

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[13] 110 Cong. Rec. 12723 (1964) (statement of Senator Humphrey).

[14] For a discussion of native land rights in Alaska, see Cohen, *supra* note 3, at 739-48.

[15] *See supra* note 11.

section 703(i) of Title VII include former Indian reservations in Oklahoma and land held by incorporated Native groups, regional corporations, and village corporations in Alaska under the provisions of the Alaska Native Claims Settlement Act.

Should a dispute arise regarding whether a particular tract of land falls within this definition, the Commission will present the question to the Bureau of Indian Affairs and will make its determination after consideration of the conclusion reached by that agency.

On or Near an Indian Reservation

Section 703(i) of Title VII uses the phrase "on or near an Indian reservation" in identifying the businesses or enterprises that may lawfully exercise the Indian preference exception provided in that section. The individual Indians to whom preferential treatment may be extended are similarly identified as those living "on or near a reservation." With respect to this phrase, the issue presented in determining whether the statutory criterion is met regards the meaning of the word "near," which is undefined in the Act.

The sole Title VII case deciding the applicability of the Indian preference contained in Section 703(i) is *Livingston v. Ewing*, 601 F.2d 1110, 20 EPD ¶30,002 (10th Cir.), *cert. denied*, 444 U.S. 870, 20 EPD ¶30,266 (1979). In that case, the non-Indian plaintiffs challenged the policy of the Museum of New Mexico in Santa Fe of permitting only Indians to sell their handmade jewelry and crafts on the grounds of the Museum. Holding that the Museum's policy came within the Section 703(i) exception, even

though the Museum was not the direct employer of the Indians, the court found that the "on or near" requirement was satisfied by facts showing that the Museum was located eight miles from an Indian reservation and within a "short distance" of other reservations, including the ones from which the Indians came. 601 F.2d at 1115.

However, because the court's holding in *Livingston v. Ewing* is fact-specific, the decision in that case does not provide a definition of the word "near" for Title VII purposes. Nor is general guidance on the meaning of that term found outside of Title VII in the Supreme Court's decision in *Morton v. Ruiz*, 415 U.S. 199 (1974). Although the Court there held that, in appropriating funds for the Bureau of Indian Affairs' general assistance program, Congress did not intend to limit eligibility for benefits under the program to Indians living "on" a reservation, to the exclusion of those living "near" one, the Court did not decide the breadth of the term "near." Rather, the Court held that it covered the Indian plaintiffs, who lived in an Indian community fifteen miles from their reservation.

Although applicable judicial precedent defining "near" is lacking, a definition of that term is found in regulations issued by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor. 41 C.F.R. §60-1.1 *et seq.* (1987). The regulations, which apply to federal contractors, define "near" with reference to an Indian preference provision similar to that contained in Section 703(i) of Title VII. The regulations provide in pertinent part:

> *Work on or near Indian reservations.* It shall not be a violation of the equal opportunity clause for a construction or nonconstruction contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. *The use of the word "near" would include all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day.*

41 C.F.R. §60-1.5(a)(6) (1987) (emphasis added.)[16]

Upon considering the intent of Section 703(i), the Commission is persuaded that the definition of "near" in the OFCCP regulations cited above is consistent with and furthers the purpose of the Title VII provision. As noted, this definition appears in the specific context of an Indian preference provision that parallels that in Title VII. Unlike a definition that establishes the outer reach of that term by specifying a fixed distance applicable in all cases, a definition based on what may be considered reasonable commuting distance provides the flexibility necessary to take differing geographic and economic circumstances

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[16] The Commission notes that the term "near" is similarly defined in Department of the Interior regulations implementing the Indian preference provision of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §450e(b). At 48 C.F.R. §1404.7001 (1987), these regulations provide:

> "On or near an Indian reservation" means on a reservation or the distance within that area surrounding an Indian reservation(s) that a person seeking employment could reasonably be expected to commute to and from in the course of a work day.

into account. Thus, since proximity to employment sources varies from one reservation to another and one part of the country to another, such a definition avoids potential inequities and promotes a fair application of the statutory exception.

For these reasons, the Commission adopts the definition of "near" provided in the OFCCP regulations set forth above as the definition of that term under Section 703(i) of Title VII. Applying this definition, determinations of whether the "on or near" criterion is met shall be made on a case-by-case basis.

Employment Practice

To what extent may preferential treatment be accorded Indians under Section 703(i)? That section provides an Indian preference exception with respect to "any publicly announced employment practice." The legislative history, discussed above, indicates that this exception permits covered employers to follow preferential *hiring* practices toward Indians.[17] The question before the Commission is whether the term "employment practice" in Section 703(i) thus refers solely to initial hiring decisions.

In *Morton v. Mancari*, 417 U.S. 535, 7 EPD ¶9431 [8 FEP Cases 105] (1974), the Supreme Court upheld an employment preference for Indians in the Bureau of Indian Affairs (BIA) under Section 12 of the Indian Reorganization Act of 1934, 25 U.S.C. §472. The Court held that the preference provided in the 1934 Act was not

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[17] *See supra* note 13 and accompanying text.

repealed by implication by the 1972 amendments to Title VII, which extended Title VII's discrimination prohibitions to federal sector employment. The Court further held that the preference did not constitute invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment. The statute at issue in *Mancari* provides a preference with respect to "appointment to vacancies." Although the preference previously had been accorded only at the initial hiring stage, under BIA policy as revised in 1972 it was extended to filling vacancies by original appointment, reinstatement, and promotions. 417 U.S. at 538 n.3. Because the question of whether the 1934 Act authorized a preference in other than initial hiring was not before the Court in *Mancari*, the Court noted that it expressed no opinion on that issue. *Id.* at 539 n.5. However, the Court cited two lower court decisions in which the phrase "appointment to vacancies" in Section 12 of the 1934 Act was specifically construed, *Freeman v. Morton* and *Mescalero Apache Tribe v. Hickel*.

In *Freeman v. Morton*, 499 F.2d 494 (D.C. Cir. 1974), the court held that the BIA preference applies to filling vacancies through initial hiring, promotion, lateral transfer, and reassignment. In *Mescalero Apache Tribe v. Hickel*, 432 F.2d 956 (10th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971), the court concluded that the preference was not applicable to reductions in force since such circumstances do not involve the filling of vacancies. Based on the statutory language and the legislative history, the court in *Mescalero* found that Congress did not intend the preference to be applied in a manner that would result in the displacement of existing non-Indian employees of BIA.

Following the Tenth Circuit's decision in *Mescalero*, however, Congress enacted legislation making the preference applicable to reductions in force at BIA and the Indian Health Service. *See* 25 U.S.C. §472a(a) (1982). "The purpose of this provision is to overcome the adverse effects of the *Mescalero decision. . . . " H.R. Rep. No. 370, 96th Cong., 1st Sess. 12, reprinted in* 1979 U.S. Code Cong. & Ad. News 2068, 2077. *See Preston v. Heckler,* 734 F.2d 1359, 1371 n.15 (1984) (commenting on the Congressional response to *Mescalero* in a case involving application of the preference in the Indian Health Service).

In the Commission's view, Congress's use of the general term "employment practice" in section 703(i) of Title VII suggests an intent to permit preferential treatment of Indians more broadly than in the context of hiring alone. Although the court cases discussed above analyze the scope of an Indian preference authorized under a statute other than Title VII, the Commission believes that these decisions and the subsequent Congressional enactment in response to *Mescalero* provides useful guidance in determining the breadth of the term "employment practice" in Section 703(i).

Drawing upon this guidance, it is the Commission's position that, for Title VII purposes, employment practices under which preferential treatment may be accorded to Indians are those requiring the selection of individuals to fill positions, however created, or to retain positions when jobs are eliminated. Accordingly, the preference is applicable to employment decisions involving, for example, hiring, promotion, transfer, and reinstatement as well as to layoffs and reductions in force.

The Commission does not reach a determination of whether the term "employment practice" in Section 703(i) covers other terms conditions, or privileges of employment, such as compensation, benefits, work assignments, or training. The issue of whether that Indian preference in Title VII extends to employment decisions involving such terms and conditions is non-CDP. Charges raising this issue should be processed according to the instructions provided in EEOC Compliance Manual §603 for processing priority-issue charges.

Tribal Affiliation

The final issue to be addressed is whether the extension of an employment preference based on tribal affiliation - that is, a preference limited to Indians who belong to a particular tribe, to the exclusion of members of any other tribe – is permissible under section 703(i) of Title VII. The issue arises, for example, where an employer located on or near a specific Indian tribe's reservation wishes to accord a preference restricted to members of that tribe either on its own initiative or in compliance with a tribal ordinance requiring that a preference be given to members of the tribe.

The Indian preference exception provided in Section 703(i) is stated in general terms. That section neither expressly authorizes nor prohibits a distinction among Indians based on tribal membership. By contrast to Title VII, which is silent on the issue of trial affiliation, regulations promulgated by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor

and by the Department of the Interior specifically prohibit consideration of tribal affiliation in according the preferences permitted.

The relevant provision of the OFCCP regulations, which are applicable to federal contractors, is found at 41 C.F.R. §60-1.5(a)(6) (1987). The first two sentences of that section are set out in the foregoing discussion of the definition of the phrase "on or near an Indian reservation." The final sentence of the section provides, in pertinent part, as follows:

> Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or *tribal affiliation*. . . .

41 C.F.R. §60-1.5(a)(6) (1987) (emphasis added).

Section 7(b) of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450e(b), requires the inclusion of Indian preference provisions in certain federal contracts and grants. Regulations issued by the Department of the Interior, governing the implementation of Section 7(b) of that Act, appear at 48 C.F.R. §1404.7000 *et seq.* and §§1452.204-71 and 72 (1987). These regulations require the insertion of the following clause in specified contracts:

> The Contractor agrees to give preference to Indians who can perform the work required regardless of age (subject to existing laws and regulations), sex, religion, or *tribal affiliation* for training and employment opportunities under this contract and, to the extent feasible consistent with the efficient performance of this contract, training and employment preferences and

> opportunities shall be provided to Indians regardless of age (subject to existing laws and regulations), sex, religion, or *tribal affiliation* who are not fully qualified to perform under this contract.

48 C.F.R. §1452.204-71 (1987) (emphasis added).

Thus, under the cited regulations of both OFCCP and the Department of the Interior, covered federal contractors may not discriminate among Indians on the basis of tribal affiliation in extending an employment preference. Although Title VII is silent in this regard, the Commission considers the prohibition expressed in those regulations to best serve the purpose intended by Section 703(i).

On this point, the Commission believes that, in enacting Section 703(i), Congress intended to encourage the extension of employment opportunities to Indians generally, without allowing discrimination among Indians of different tribes. Under section 703(i), the exception applies to employment practices under which preferential treatment is given to "*any* individual because he is an Indian living on or near a reservation" (emphasis added). The statutory language supports the conclusion that Congress did not intend to permit tribal distinctions among Indians otherwise qualifying for such preferential treatment.

Further, as a practical matter, the Commission notes that in some instances employers may be located on or near the reservation of only one tribe and that the Indians living on or near that reservation may be members of that tribe. Under such circumstances, the preference may operate, in effect, to favor only members of that specific

tribe without disadvantaging Indians of other tribes. However, in some parts of the country employers are situated near the reservations of more than one tribe or more than one tribe may share the same reservation. The potential inequities resulting from according a preference based on tribal affiliation are most clearly evident when these circumstances are contemplated.

In light of these considerations, it is the Commission's position that extension of an employment preference on the basis of tribal affiliation is in conflict with and violates Section 703(i) of Title VII. The Commission emphasizes, however, that its position with respect to Section 703(i) affects only employers covered by Title VII. Since Indian tribes are exempt from the provisions of the Act under Section 701(b)(1), preferences or requirements based on tribal membership or affiliation imposed by a tribe with respect to its own employment practices are not violative of Title VII. *See Wardle v. Ute Indian Tribe,* 623 F.2d 670, 23 EPD ¶31,035 [23 FEP CAses 35] (10th cir. 1980).

Date: 5/16/88

Approved: /s/

Clarence Thomas,
Chairman

MOTION FILED
MAY 10 1999

(3)

No. 98-1628

In The

Supreme Court of the United States

SALT RIVER AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

vs.

HAROLD DAWAVENDEWA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NAVAJO NATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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2098

QUESTIONS PRESENTED

The Navajo Nation adopts the "Questions Presented" section of the Petition for Writ of *Certiorari*.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

COMES NOW the Navajo Nation by counsel, pursuant to Sup.Ct.R. 37(b), and moves this court for an order granting leave to file a brief *amicus curiae* in support of the Petition for Writ of *Certiorari;*

Petitioner has consented. Respondent has declined, although it (a) previously consented to the filing of an *amicus curiae* brief by the Navajo Nation in support of The Petition for Rehearing and Suggestion for Rehearing *en banc* filed below in the United States Court of Appeals for the Ninth Circuit and (b) has stated it will consent to the Navajo Nation filing a brief *amicus curiae* if this Court grants *certiorari.*

The interest of the Navajo Nation is as follows:

1. In 1985, the Navajo Nation Council passed the Navajo Preference in Employment Act, codified at 15 NNC § 601, *et seq.* (1995), as amended, by which terms enrolled members of the Navajo Tribe are afforded preferential treatment in hiring.

2. It is the belief of the Navajo Nation that this type of preference is legislatively endorsed and required by numerous other tribal governments.

3. Unemployment on the Navajo Nation is currently approximately fifty-eight percent (58%).

4. The opinion below in the Ninth Circuit is tantamount to vetoing the Navajo Preference in Employment Act.

5. No rights of any party will be violated by the acceptance by this court of a brief *amicus curiae* by the Navajo Nation. Conversely, the right to be heard of the two hundred forty thousand (240,000) members of the Navajo Nation, citizens of the United States of America, will be denied if this Motion for Leave is not granted.

Respectfully submitted,

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The Navajo Nation adopts the "Opinions Below" section of the Petition for Writ of *Certiorari*.

JURISDICTION

The Navajo Nation adopts the "Jurisdiction" section of the Petition for Writ of *Certiorari*.

STATUTORY PROVISION INVOLVED

The Navajo Nation adopts the "Statutory Provision Involved" section of the Petition for Writ of *Certiorari*.

INTEREST OF *AMICUS CURIAE*

Unemployment on the Navajo Nation rages above 55%.[1] This is more than ten times the national average and means that one out of every two Navajos cannot find work, thereby becoming a financial burden on the Navajo Nation and the larger society as well.

Economic development is slow in coming to Indian Country, and the Navajo reservation is no exception (especially given its repeated rejections of the gambling industry). Jobs, any jobs, on or near the Navajo reservation must be first afforded the Navajo people, on whose homeland the employer operates. As will be developed

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[1] U.S. Department of the Interior, Bureau of Indian Affairs, *Labor Market Information on the Indian Labor Force*, 1997.

below, Congress understood and responded decisively to this when it adopted Title VII and, especially, the "Indian preference exemption" contained in 42 U.S.C. § 2000e-2(i) (1997).

This Court has already essentially upheld the position of *amicus* a quarter century ago in *Morton v. Mancari*, 417 U.S. 535 (1974). Unfortunately, the Ninth Circuit has misinterpreted both Congressional intent and this Court's ruling. If allowed to stand, it will shatter an already fragile economy wherein, for far too many, life, liberty, and the pursuit of happiness is a cruel hoax.[2]

ARGUMENT

I. THE NAVAJO NATION HAS A SOVEREIGN'S DUTY TO ADDRESS THE VICIOUS UNEMPLOYMENT ON ITS RESERVATION, IN COORDINATION WITH UNITED STATES LAWS WHICH, IF AT ALL AMBIGUOUS, MUST BE INTERPRETED CONSISTENT WITH THE LONGSTANDING FEDERAL POLICY OF STRENGTHENING TRIBAL GOVERNMENT.

No other group of Americans is more economically depressed than Native Americans, and no other areas in America suffer more from . . . a lack of job

---

[2] Petitioner has consented to the filing of this *Amicus* Brief. Respondent has declined, as noted in the attendant Motion for Leave to File. Pursuant to Rule 37.6 of the rules of this Court, *amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *amicus*, has made a monetary contribution to the preparation or submission of this brief.

opportunities than do Indian reservations and Alaska Native villages. . . . In my lifetime I have been to many places around the world and have experienced many terrible living conditions. What is so shocking is that the social and economic conditions for many Navajos closely resemble those of people living in Third World countries. . . .

- *Your poverty rate is five times the national average;*
- *Two-thirds of your houses are substandard because they lack running water, indoor plumbing, or electricity; and*
- *Three-fourths of your people can't get home telephone service, and so are cut off from critical emergency help and information.*[3]

A. With certain notable aberrations, longstanding federal policy has been to strengthen tribal governments.[4] The policy, to be sure, has been to help Indians, but since 1934 it has been uniquely and forcefully implemented via *tribal membership*, not individually. This may be due to the

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[3] Senator John McCain (R-AZ), January 18, 1996 Statement before the Navajo Nation Council.

[4] "The cases reflect a pervasive influence of (a) the tradition of federal policy to encourage the development and exercise of tribal self-governing powers and (b) the assumed federal obligation to preserve and protect those powers. These factors have been the touchstones of statutory interpretation for the courts." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (2d ed. 1982), at pp. 242-3, citing as authority *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *United States v. Wheeler*, 435 U.S. 313 (1978); *Bryan v. Itasca County*, 426 U.S. 373 (1976).

circumstances in which Europeans typically first encountered Native Americans, i.e., clustered and rigidly segregated in discrete tribal communities with historically accepted general territories. In the Navajo situation, the federal government reduced but generally recognized this tribal boundary as a basis for the reservation. Tribal communities have continued to govern themselves through their own individual tribal governments. When Europeans, or their political descendants in Congress today (or in 1964), spoke of "Indians" they meant, and knew they meant, "tribes." And this has the highest pedigree in American jurisprudence: in the United States Constitution, Congress is given the power to "regulate Commerce . . . with the Indian *Tribes*" (not with individual Indians). Article I, § 8 cl. 3 (emphasis supplied).[5]

B. Inherent in all of this, of course, is sovereignty. The Navajo Nation is a sovereign recognized by the federal and state governments and the numerous corporations and businesses, like Petitioner, which enter into commercial dealings with the Nation. The Navajo Nation has a government's usual duties and obligations. Some of these, like defense of borders, are provided by the federal government. But, like any other government, the Navajo Nation has an obligation to its citizens to protect and nurture their health and welfare. One primary way to do

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[5] Nowhere is this concept clearer than in the history of the over 400 treaties between first Europeans, then the United States, and Native Americans. Each separate treaty was made with *this* specific tribe with language specific to *this* tribe's historical land, and (thankfully, at least, for the Navajos) regarding *this* land becoming *this* tribe's reservation.

this is through the development of employment opportunities, as encouraged and protected by (a) the lease language at issue (*see* Petitioner's Brief at 2) and (b) the Navajo Preference in Employment Act (15 NNC § 601 *et seq.* (1995)) (*see* Petitioner's Brief at 3, 9). Absent review by this Court, the Ninth Circuit negates the ability to fulfill this obligation, and destroys the fabric of employment law utilized and acknowledged by employers like Petitioner on the Navajo reservation since 1969.

And, most importantly, this toppling by the Ninth Circuit of Navajo private employment law (a) is not based on sound legal reasoning and (b) as will be discussed in the following section, violates both Congressional intent[6] and this Court's jurisprudence.

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[6] "Before holding that treaties or statutes limit tribal powers, however, the courts have insisted upon a clear and specific expression of congressional intent to extinguish traditional prerogatives of sovereignty. Judicially accepted canons of construction dictate that legislation be liberally construed and that any ambiguities be resolved in favor of Indians. Furthermore, even when a statute was passed in an assimilationist era, which might suggest a generalized congressional intent to abrogate *tribal* powers, the courts will not 'strain to implement a policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.' " COHEN, *supra* note 3, at 242 (footnotes omitted) (emphasis supplied).

II. CONGRESS CLEARLY AND INTENTIONALLY EXCLUDED THIS ISSUE FROM ALL TITLE VII ANALYSIS BY EXPLICIT STATUTORY LANGUAGE AS CORROBORATED BY SUBSEQUENT AND RELEVANT LEGISLATION IN OTHER AREAS OF INDIAN LAW.

Title VII prohibits discrimination against *any* protected category (race, color, religion, sex, or national origin). But explicitly excepted from that worthy prohibition, at 42 U.S.C. § 2000e-2(i), is the clear Indian preference language for employers on or near an Indian reservation. They are permitted to favor, pursuant to a publicly announced practice of preference, Indians living on or near a reservation (rationally, that same reservation where the employer operates). This subsection (i) exception is clear, concise, and blunt: "*Nothing* contained . . . (herein) . . . shall apply to any business . . . on or near an Indian reservation . . . " (emphasis supplied) regarding the employment of Indians on or near (rationally, that) reservation.[7]

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[7] If, as Respondent claims, Congress intended to simply help Indians generally, "on or near the reservation" is irrelevant and there could have simply been a blanket "Indian preference" everywhere. But the use of "on or near the reservation" clearly implies *these* Indians (members of *this* tribe) on *their* reservation. To interpret otherwise would encourage "job migration" with Indians leaving their homelands and chasing jobs wherever they may be found at the moment "near" some other tribe's reservation. Such a situation would further weaken tribal unity and tribal governments in direct opposition to federal policy.

The controlling case on this issue is *Morton*, in which this Court approved the Bureau of Indian Affairs' preference for Indian job applicants and candidates for promotion.

Morton made three things explicitly clear. First, what appears to be racial (i.e., Indian) preference is really political affiliation preference. Second, that preference is permissible. Finally, when subsection (i) says "nothing", it means "nothing."[8]

Logically, Title VII does not apply to this Indian preference whether the claim is "race" or a neatly retooled (but equally flawed) "national origin" argument.[9]

III. THE NINTH CIRCUIT MISINTERPRETED BOTH THE VIABILITY OF THE EEOC REGULATION AND THIS COURT'S HOLDING IN *MORTON*.

The Ninth Circuit's decision should be overturned on several grounds: (a) it ignored the abstention and contractual "benefit of the bargain" issues; (b) it relied on a

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[8] The overriding import of this was recognized by the Court: "If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 USC) [25 USCS] would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Morton* at 552. (authorities omitted).

[9] Presumably "color" as a category would also be excluded under this "nothing means nothing" analysis. And, since there is no hierarchy of protection among the Title VII classes, the *Morton* endorsement would apply equally as the circumstances dictate.

now suspect EEOC policy statement; and (c) it incorrectly applied this Court's holding in *Morton*.

The Ninth Circuit erred when it did not require abstention at the District Court level. Likewise, the court misread the contractual "benefit of the bargain" lease issue, whereby the Navajo Nation originally granted lessee/Petitioner Salt River Project ("SRP") the right to construct and operate its generating station for the explicit consideration of job creation and Navajo preference. In fact, these jobs were so crucial to the economic lifeblood of the Nation that SRP was able to exact additional consideration in the form of Navajo tax waivers. (This required approval by the 74-member Navajo Nation Council, the governing body of the Nation, by resolution of May 27, 1969.)

Error was also committed when the Ninth Circuit relied on an EEOC policy statement[10] which, while well-intentioned, failed to properly interpret and apply this Court's decision in *Morton*.[11] Even more compellingly, the

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[10] *Policy Statement on Indian Preference Under Title VII*, Fair Empl. Prac. (BNA) 405:6647 (May 16, 1988).

[11] It is literally hornbook law that a statute trumps its regulatory interpretation: "Administrative regulations must be consistent with the . . . statutory authority by which they are authorized. Administrative rules may not enlarge, alter, or restrict the provision of the statute being administered." 2 Am. Jur. 2d *Administrative Law* § 227 (1994). This Court has confirmed the point in *United States v. Larionoff*, 431 U.S. 864 (1977), finding that regulations must be consistent with their authorizing statute and must effectuate the will of Congress; a regulation which creates a rule "out of harmony with the statute is a nullity." *Id.* at 873, footnote 12, quoting with approval *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129 (1936).

EEOC based its analysis on other federal regulatory interpretations which were themselves essentially unequivocally rejected and negated by Congress. The EEOC had based its policy on regulations interpreting provisions of the Indian Self-Determination and Education Assistance Act (ISDA), Section 7 of Public Law 93-638. But the EEOC then failed to change its policy when Congress in 1994 amended that section of the law by adding new subsection (c) endorsing the use of tribal preference laws and policies. *See* Public Law 103-413 Section 102, codified at 25 U.S.C. § 450e(c) (1997).[12]

Congress' 1994 amendment to ISDA's employment preference provision did two things relevant to these proceedings: first, it clarified beyond argument congressional approval of tribal preference. Second, in so doing, it collapsed the explicit and avowed foundation of the EEOC policy statement on which the Ninth Circuit later based its decision. (The argument does not follow, however, that since Congress *did* amend ISDA but did *not* amend Title VII, it favored conflicting policies. Congress

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[12] The Navajo Nation expressly sought the amendment of Section 7 of the ISDA. This was done to avoid further disputes between Navajo law (the Navajo Preference in Employment Act, 15 NNC § 601 *et seq.*, and the Navajo Nation Business Preference Law, 5 NNC § 201 *et seq.*) and federal law when implementing the ISDA. *See* Testimony of Navajo Nation Representative Britt E. Clapham, II, Senior Assistant Attorney General, as referenced at S. REP. NO. 103-374 (1994) at 7. Throughout the development of Public Law 103-413, the Nation consistently advocated this change in the ISDA before both the Senate and the House of Representatives, as well as with Administration representatives.

had no need to clarify Title VII; this Court had already precisely done so in 1974, in *Morton*.)

Finally, the Ninth Circuit misinterpreted and misunderstood *Morton*, which stands for the proposition that "Indian preference" is actually "tribal preference" and that such preference withstands both Fifth Amendment and Title VII scrutiny.

Significantly, *Morton* is consistent with both the Framers' intent as expressed in the United States Constitution, as discussed above, and congressional intent as found in numerous federal statutes. Throughout the U.S. Code, "Indian" is routinely defined as "a member of an Indian tribe"; a political distinction, not a racial one. Mere *eligibility* for membership in a tribe by virtue of parentage is frequently insufficient: a person must actually be a recognized member.[13]

For example, in 20 U.S.C. § 4402(4) (1997), we find "[t]he term 'Indian' means any person who is a member of an Indian tribe"; at 20 U.S.C. § 7881(4) (1997), "[t]he term 'Indian' means an individual who is – (A) a member of an Indian tribe or band, as membership is defined by the tribe or band . . . ". Again, 25 U.S.C. § 1452(b) (1997) states " 'Indian' means any person who is a member of any Indian tribe, band, group, pueblo, or community which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs . . . ".

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[13] While it is true that the Indian Child Welfare Act (25 U.S.C. §§ 1901-63 (1997)) [ICWA] references "enrolled or eligible to be enrolled", it has a different purpose, and implicitly acknowledges that tribal enrollment may not be automatic. Moreover, it has an explicit hierarchical preference for intra-tribal adoptions.

Congressional intent could not be clearer: "Indian" means "tribal member."[14]

This definition is recognized by the Department of Health and Human Services (DHHS)' regulations regarding eligibility for Indian Health Services which reflect the importance of actual membership rather than mere eligibility.[15] The initial draft of these regulations based eligibility on a blood quantum requirement rather than

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[14] There are still other federal statutes that define "Indian" as a member of a tribe. *See*, e.g., 25 U.S.C. § 3103(9) (1997); 25 U.S.C. § 3703(8) (1997); 25 U.S.C. § 4103(9) (1997); 42 U.S.C. § 1437a(9) (1997); 42 U.S.C. § 1996a(c)(1) (1997). Consistent with those statutory definitions, the Bureau of Indian Affairs, in determining eligibility for social services, defines "Indian" as "any person who is a member, or a one-fourth degree or more blood quantum descendant of a member of any Indian tribe." 25 C.F.R. § 20.1(n) (1996). So, in Title VII when Congress says "Indian" it knows what it means: a tribal member. Clearly, this modern standard congressional definition of the term "Indian" is based on tribal membership and is controlled not by race but by political affiliation, as correctly identified by this Court in *Morton*.

[15] The regulations specifically limit that eligibility to "persons of Indian or Alaska native descent who: (1) are members of a federally recognized Indian tribe. . . . " 42 C.F.R. § 36.12 (1996). The regulations also require verification of tribal membership: "(1) Documentation that the applicant meets the requirements of tribal membership as prescribed by the charter, articles of incorporation, or other legal instruments or traditional processes of the tribe and has been officially designated a tribal member by an authorized tribal official or body; or (2) Certification of tribal enrollment or membership by the Secretary of the Interior acting through the Bureau of Indian Affairs." 42 C.F.R. § 36.16(b) (1996). Indian blood alone is not sufficient for IHS eligibility; the person must be an enrolled member of a tribe.

tribal membership. However, commentors, including members of Congress, consistently opposed the blood quantum basis. "Many commentors expressed concern that inclusion of a specific blood quantum requirement would interfere with a tribe's sovereignty by eliminating some tribal members from eligibility based upon racial identity rather than on the political relationship which exists between tribes and the Federal Government." 52 Fed. Reg. 35044 (1987).

Based on these and other objections, DHHS amended the regulations to their present form, noting that IHS provides services "to Indian people because of the political relationship which exists between tribes and the Federal Government rather than on a racial basis." *Id.* "The Federal governments' [sic] underlying policy is to serve Indians, not as individuals, but as members of Federally-recognized governmental entities. . . . Moreover, the approach taken in this rule is consistent with the fact that Congress has recently defined the term 'Indian' in three related statutes essentially to mean a person who is a member of Federally recognized tribe. . . . *The definition of 'Indian' in the Indian Self-Determination Act reflects the special relationship between tribes and the Federal government.* Basing eligibility on tribal membership will strengthen the role and position of tribes as well as provide IHS with a consistent definition of 'Indian.' In our view, *reliance on tribal membership* will have positive implications for Indian self-determination, the role and authority of tribal government, inter-tribal relationships, and the existing Federal-Indian relationship." *Id.* at 35046 (emphasis supplied).

In *Morton*, this Court affirmed the federal policy of supporting *tribal* organizations and *tribal* development, as

the rational and effective way to protect individual Indians. "The overriding purpose of (the Indian Reorganization Act) was to establish machinery whereby Indian *tribes* would be able to assume a greater degree of *self-government*, both politically and economically." *Morton* at 542 (footnote omitted) (emphasis supplied). "The solution ultimately adopted was to strengthen *tribal government . . .* ". *Id.* at 543 (emphasis supplied). Finally, this Court noted that the Title VII Indian preference exemption "reveals a clear congressional recognition within the framework of Title VII, of the unique legal status of *tribal and reservation-based* activities." *Id.* at 545-46 (emphasis supplied).

In this present context, first in the Constitution and then routinely thereafter, the United States government has dealt with Native American issues on a tribal (not racial or individual) basis.

CONCLUSION

This is a matter of survival for the economic life of the Navajo Nation. The established rules of Indian Law construction, the intent of Congress, and the wisdom of this Court all combine to support the Petition for Writ of *Certiorari*, and ultimate reversal of the Ninth Circuit's mistaken holding.

Respectfully submitted,

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In the Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, PETITIONER

v.

HAROLD DAWAVENDEWA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether an employer's preference for members of a particular Tribe constitutes a form of discrimination on the basis of "national origin" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2.

2. Whether such a preference is justified by the Indian preference exemption to Title VII, 42 U.S.C. 2000e-2(i).

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SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, PETITIONER

v.

HAROLD DAWAVENDEWA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Salt River Project (petitioner) is a municipal corporation and political subdivision of the State of Arizona. Pet. 2; Pet. App. 2a. Petitioner operates a generating station that is located within the boundaries of the Navajo Indian Reservation. Pet. App. 2a. Petitioner has operated the station pursuant to a lease agreement entered into with the Navajo Nation in 1969. *Ibid.* That lease requires petitioner to give an employment preference to qualified members of the Navajo Nation living on land within the Nation's jurisdiction.

Ibid. In the event that such persons are not available, preference must then be given first to non-local Navajos, then to non-Navajos. *Id.* at 2a-3a & n.2.

In 1991, Harold Dawavendewa (respondent) applied for a position at petitioner's generating station. Pet. App. 3a. Respondent is a member of the Hopi Tribe and lives less than three miles from the Navajo reservation. *Ibid.* Respondent passed petitioner's employment test, but after petitioner determined that respondent is not a member of the Navajo Nation, it rejected his application. *Ibid.* Respondent filed suit against petitioner, alleging that petitioner had discriminated against him on the basis of national origin, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 3a.

Petitioner filed a motion to dismiss for failure to state a claim. Pet. App. 4a. Petitioner argued that its preference for members of the Navajo Nation reflects a distinction based on political affiliation, rather than national origin. *Ibid.* Petitioner alternatively argued that its policy is justified by the Indian preference exemption to Title VII set forth in 42 U.S.C. 2000e-2(i). Pet. App. 4a. That provision states that

> [n]othing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

42 U.S.C. 2000e-2(i).

The district court granted petitioner's motion to dismiss. Pet. App. 20a-27a. It ruled that petitioner's pref-

erence for members of the Navajo Nation is protected by the Indian preference exemption. *Id.* at 23a-27a.

2. The court of appeals reversed. Pet. App. 1a-19a. The court first ruled that discrimination on the basis of tribal affiliation constitutes national origin discrimination within the meaning of Title VII. *Id.* at 4a. The court reasoned that, "[b]ecause the different Indian tribes were at one time considered nations, and indeed still are to a certain extent, discrimination on the basis of tribal affiliation can give rise to a 'national origin' claim under Title VII." *Id.* at 7a.

The court of appeals rejected petitioner's contention that, under *Morton* v. *Mancari*, 417 U.S. 535 (1974), a preference for tribal members is based on political affiliation rather than national origin. Pet. App. 7a-8a. The court distinguished *Mancari* on the grounds that (1) *Mancari* did not involve a claim of discrimination on the basis of membership in a particular tribe, (2) *Mancari* involved a constitutional claim rather than a Title VII claim, and (3) the preference involved in *Mancari* furthered an interest in tribal self-governance. *Ibid.*

The court of appeals next held that the Indian preference exemption does not authorize discrimination based on tribal affiliation. Pet. App. 11a-19a. The court noted that the text of the exemption extends protection to "preferential treatment given . . . to any individual *because he is an Indian* living on or near a reservation." Pet. App. 11a (quoting 42 U.S.C. 2000e-2(i)). The court further noted that "[t]he term 'Indian' is generally used to draw a distinction between Native Americans and all others." Pet. App. 11a. The court concluded that a preference for members of a particular Tribe falls outside the scope of the exemption, because it "does not afford preference to an applicant 'because

he is an Indian,' but rather because he is a member of 'a particular tribe.'" *Id.* at 11a-12a.

The court of appeals also concluded that a Tribe-specific preference is not consistent with the objectives of the Indian preference exemption. Pet. App. 12a. In the court's view, the purpose of the exemption is "to permit the favoring of Indians over *non-Indians*," not "to permit employers to favor members of one Indian tribe over another." *Ibid.* The court therefore concluded that, in order to fall within the terms of the exemption, "[t]he reason for the hiring must be because the person is an Indian, not because he is a Navajo, a male Indian, or a member of any other formal subset of the favored class." *Ibid.*

In reaching that conclusion, the court of appeals gave "due weight" to the position of the Equal Employment Opportunity Commission (EEOC). Pet. App. 11a. In a 1988 policy statement, the EEOC took the position that the "extension of an employment preference based on tribal affiliation" is not protected by the Indian preference provision. *Policy Statement on Indian Preference Under Title VII (EEOC Policy Statement)*, [8 Fair Empl. Prac. Man.] Lab. Rel. Rep. (BNA) 405:6647, 405:6653 (May 16, 1988).

The court rejected petitioner's reliance on the 1994 Amendments to the Indian Self-Determination Act (ISDA), which provide that, with respect to employment under "self-determination" contracts between a Tribe and the Departments of the Interior and Health and Human Services, "tribal employment or contract preference laws adopted by such tribe shall govern." 25 U.S.C. 450e(c). Pet. App. 13a-16a. The court reasoned that those amendments have "little if anything to do" with what Congress intended when it enacted Title VII, that ISDA and Title VII serve "fundamentally

different purposes," that ISDA "governs a very limited set of employment situations," and that petitioner is not acting pursuant to an ISDA contract. *Id.* at 15a. The court added that the 1994 Amendments demonstrate that "when Congress wishes to allow tribal preferences, it adopts an appropriate amendment to the applicable statute." *Id.* at 16a.

Finally, the court of appeals noted "the possible inequities that would arise in allowing tribal affiliation discrimination, particularly in areas where there are many different tribal reservations." Pet. App. 17a. The court observed that, under petitioner's interpretation of the Indian preference exemption, "any private employer situated near a Hopi *and* Navajo reservation could arbitrarily institute a blanket-policy of preferential treatment towards members of one or the other of the tribes." *Id.* at 17a-18a. The court concluded that "[w]ithout a clear indication to the contrary, this appears to be the sort of individual discrimination wholly within the scope of Title VII." *Id.* at 18a.

DISCUSSION

The court of appeals correctly held that an employment preference based on tribal affiliation is a form of national origin discrimination within the meaning of Title VII and that Title VII's Indian preference exemption does not justify such a preference. The court's holdings are consistent with the position of the EEOC, the agency charged with primary responsibility for enforcing Title VII. No other court of appeals has addressed either of the questions raised by petitioner. Moreover, this case is in an interlocutory posture, and petitioner would not be barred from presenting other arguments in defense of its preference on remand to the

district court. The petition for a writ of certiorari should therefore be denied.

1. Petitioner contends (Pet. 19-21) that discrimintion based on tribal affiliation is not a form of "national origin" discrimination within the meaning of Title VII. That contention is without merit.

In *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 88 (1973), the Court construed the term "national origin" to include "the country where a person was born, or, more broadly, the country from which his or her ancestors came." After *Espinoza*, a lower court held that discrimination against Cajuns who could trace their ancestry to Acadia constituted discrimination based on national origin, even though Acadia was not and had never been an independent nation. *Roach* v. *Dresser Indus. Valve & Instrument Div.*, 494 F. Supp. 215 (W.D. La. 1980). The EEOC subsequently revised its definition of national origin discrimination to reflect its approval of that decision. The EEOC's current regulations define national origin discrimination to include "the denial of equal employment opportunity because of an individual's or his or her ancestor's place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. 1606.1; see also *Pejic* v. *Hughes Helicopters, Inc.*, 840 F.2d 667, 673 (9th Cir. 1988) (holding that discrimination against Serbians constitutes discrimination based on national origin even though Serbia as a nation had become extinct).

Under *Espinoza* and the EEOC's regulations, a preference that is extended only to members of a particular Indian tribe constitutes discrimination based on "national origin" within the meaning of Title VII. Before the arrival of the Europeans, Tribes had the status of independent nations. *Worcester* v. *Georgia*, 31 U.S. (6

Pet.) 515, 559-561 (1832). Moreover, while Tribes are no longer fully independent, they retain their status as "domestic dependent nations." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Discriminating against an individual because he is not a member of a particular Tribe is therefore a form of national origin discrimination within the meaning of Title VII. As the court of appeals explained, "[b]ecause the different Indian tribes were at one time considered nations, and indeed still are to a certain extent, discrimination on the basis of tribal affiliation can give rise to a 'national origin' claim under Title VII." Pet. App. 7a.

Petitioner does not challenge the court of appeals' conclusion that a particular Tribe is a "nation" of origin for purposes of Title VII. Instead, petitioner argues (Pet. 19-21) that, under *Morton* v. *Mancari*, 417 U.S. 535 (1974), a preference extended to members of a particular Tribe is necessarily based on political affiliation, rather than national origin. Petitioner's reliance on *Morton* is misplaced.

In *Morton*, the Court upheld the constitutionality of a federal law extending a preference for employment in the Bureau of Indian Affairs (BIA) to members of federally recognized tribes. The Court rested its decision on "the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized tribes." 417 U.S. at 551. The Court emphasized that if laws "designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Id.* at 552. In that legal and historical context, the

Court concluded that the Indian employment preference was not a "racial preference," because it "is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 553-554. More generally, the Court held that, "[a]s long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555. Because the BIA employment preference rationally served the "non-racial" goals of "further[ing] the cause of Indian self-government," and "mak[ing] the BIA more responsive to the needs of its constituent groups," it did not violate constitutional equal protection principles. *Id.* at 554.

The preference at issue in this case was not adopted by the federal government as part of its "unique obligation toward Indians." Instead, it was adopted by a municipal employer acting without congressional authorization. Petitioner's assertion that the decision below conflicts with *Mancari* is therefore incorrect. Contrary to petitioner's contention, nothing in *Mancari* suggests that all preferences based on membership in an Indian Tribe should be regarded as being based on political affiliation, rather than national origin. If that were the case, any employer anywhere in the country might claim to be free to hire (or refuse to hire) individuals affiliated with a particular Tribe, even where there was no congressional authorization or reservation nexus.

Because the Navajo Nation has an ordinance that requires that a preference must be given to its members for work performed on its Reservation, and a similar preference is contained in the lease between the

Navajo Nation and petitioner concerning the use of land held in trust for the benefit of the members of the Nation, petitioner's preference for members of the Navajo Nation could arguably be viewed as "political." Petitioner, however, has not made that more limited argument. Instead, it has argued (Pet. 19-21) that *all* preferences based on membership in a Tribe are necessarily political and therefore not based on "national origin" within the meaning of Title VII. The court of appeals correctly rejected that contention.

Moreover, unlike the Constitution, Title VII prohibits not only practices that facially or intentionally discriminate on the basis of national origin, but also those that cause "a disparate impact on the basis of * * * national origin" unless they can be justified as "job related" and "consistent with business necessity." 42 U.S.C. 2000e-2(k)(1)(A)(i); see *Espinoza*, 414 U.S. at 92; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). An on-reservation employer's preference for members of a particular Tribe in conformity with a tribal ordinance, even if facially "political," plainly has the effect of preferring persons of a particular national origin group. Ordinarily, a preference that has such an effect violates Title VII unless it can be justified as job-related and consistent with business necessity. The court of appeals did not address the questions whether an on-reservation employer's preference for members of a particular Tribe in conformity with an ordinance of that Tribe (or the terms of a lease of the trust property of that Tribe) should be viewed as a political classification, whether such a preference should be viewed as having the effect of preferring persons on the basis of political affiliation rather than national origin, and whether, if viewed as having the effect of preferring persons on the basis of national origin, it could be

justified as job related and consistent with business necessity.[1] Review of those questions is therefore not warranted here. Those issues should be left for further development in the courts below in this case or future cases and in other courts of appeals.[2]

2. Petitioner also contends (Pet. 12-19) that a preference for members of a particular Tribe is justified by the Indian preference exemption. The court of appeals correctly rejected that contention.

a. By its terms, the Indian preference exemption applies when "preferential treatment is given to any individual because he is an Indian living on or near a reservation." 42 U.S.C. 2000e-2(i). For two reasons, that statutory text is most naturally read to authorize a preference for all Indians who live on or near a

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[1] The court of appeals likewise did not consider any argument that the treaty between the Navajo Nation and the United States, or any Acts of Congress governing the leasing or other use of property held in trust for a Tribe or its members, would furnish a justification for the preference challenged in this case.

[2] In *Rice* v. *Cayetano*, cert. granted, 120 S. Ct. 31 (1999) (No. 98-818), we have argued (Br. 11-30) that a congressionally authorized state law that provides that only Native Hawaiians may vote for members of the Office of Hawaiian Affairs creates a political classification and does not discriminate on the basis of race in violation of the Fourteenth or Fifteenth Amendments to the Constitution. Because the preference at issue here is not authorized by any Act of Congress identified by petitioner, because this case arises under Title VII rather than the Constitution, and because the narrower arguments concerning political classification based on the Navajo Nation ordinance and lease are not appropriately presented here, the question whether petitioner's preference should be regarded as national origin discrimination under Title VII is fundamentally different from the question at issue in *Rice*. This case therefore need not be held until this Court issues its decision in *Rice*.

reservation, not to authorize a preference for members of a particular Tribe who live on or near a reservation. First, when a preference is extended only to members of a particular Tribe who live on or near a reservation, rather than to all Indians who live on or near the reservation, it is difficult to say that the preference is extended to "any" individual because he is an Indian living on or near a reservation. And second, as the court of appeals explained (Pet. App. 11a-12a), a Tribe-specific preference is most readily understood as being given to an individual "because he is a member of a particular Tribe" living on or near a reservation, not "because he is an Indian" living on or near a reservation.

The facts of this case illustrate both points. Petitioner preferred members of the Navajo Nation over respondent, even though respondent is an Indian living near the Navajo reservation. If petitioner's preference had extended to "any" individual because he is an Indian living on or near a reservation, respondent presumably would have been eligible for it. Moreover, since both respondent and members of the Navajo Nation in the vicinity are Indians living on or near the reservation, it is difficult to say that a member of the Navajo Nation received a preference over respondent "because he is an Indian" living on or near a reservation. In ordinary usage, such an individual received a preference over respondent "because he is a member of the Navajo Nation" living on or near a reservation. The text of the exemption therefore supports the court of appeals' conclusion that the exemption does not protect preferences for members of a particular Tribe.

Even more important, petitioner's construction would lead to results we doubt Congress intended. Because the Indian preference provision applies not only

"on" a reservation, but also "near" a reservation, petitioner's interpretation would permit a major employer that is located near (but not on) the Navajo and Hopi Reservations to *unilaterally* prefer members of one of those Tribes. As the court of appeals explained (Pet. App. 18a), "[w]ithout a clear indication to the contrary, this appears to be the sort of individual discrimination wholly within the scope of Title VII."

The court of appeals' decision is also consistent with the EEOC's interpretation of the Indian preference exemption. In a 1988 policy statement, the EEOC expressed its considered view that the Indian preference exemption does not protect tribe-specific preferences. *EEOC Policy Statement* 405:6653. The EEOC reiterated that view in an amicus brief filed in the court below. Because the EEOC is the agency primarily charged with the responsibility of enforcing Title VII, the court of appeals appropriately gave the EEOC's view "due weight." Pet. App. 11a. See *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 256 (1991).

The court of appeals' interpretation of Title VII's Indian preference exemption is also consistent with a substantial body of federal regulatory law. The issue of Indian-based employment preferences arises in several contexts. Most notably, it arises in the context of programs that impose requirements on federal contractors. A number of regulations require or permit these contractors to grant employment preferences to Indians. Those regulations make clear that, to be valid, an Indian preference may not make distinctions on the basis of tribal affiliation. See, *e.g.*, 48 C.F.R. 22.807(b)(4) (permitting federal contractors "to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near

an Indian reservation"; contractors may not "discriminate among Indians on the basis of * * * tribal affiliation"); 48 C.F.R. 352.270-2(a) (contractors with the Department of Health and Human Services permitted to grant preferences to "Indians" but not on the basis of "tribal affiliation"); 48 C.F.R. 1452.226-70 (contractors with the Department of Interior permitted to grant preferences to "Indians" but not on the basis of "tribal affiliation"); see also 23 C.F.R. 635.117(d) (permitting a state highway agency to extend "preferential employment to Indians living on or near a reservation" but stating that any such preference shall be applied "without regard to tribal affiliation"); 25 C.F.R. 256.3(b) (providing housing assistance to "[e]very Indian * * * regardless of tribal affiliation").

b. Petitioner contends (Pet. 12-13) that the court of appeals' interpretation ignores the analytical framework that this Court has established for deciding important issues of Indian law. In particular, petitioner argues (Pet. 12-13) that the court of appeals failed to apply the principle that "[t]raditional notions of Indian self-government" serve as an "an important 'backdrop' against which vague or ambiguous federal enactments must always be measured." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980) (citation omitted). In petitioner's view, the court of appeals' interpretation intrudes on tribal sovereignty because it precludes an employer who has a business on a reservation from adopting a tribe-specific preference pursuant to an agreement with the Tribe.

Petitioner's proposed construction of the Indian preference exemption, however, is not limited to protecting preferences that promote tribal sovereignty. As we have explained, petitioner's proposed construction would also permit an employer located *near* two res-

ervations to *unilaterally* favor members of a single Tribe. Indeed, taken to its logical extreme, petitioner's proposed construction would permit a reservation employer, disgruntled with the local governing Tribe, to prefer members of another nearby Tribe. Those kinds of preferences cannot be justified by the principle that petitioner invokes. Nor is there any basis in the text of Title VII's Indian preference exemption for distinguishing between those kinds of Tribe-specific preferences and the one at issue here. Because petitioner's construction of the Indian preference exemption would protect preferences that are unjustified by traditional notions of tribal sovereignty, as well as preferences that actually conflict with traditional notions of tribal sovereignty, the principle involved in *White Mountain Apache Tribe* does not support petitioner's reading of that exemption.

Petitioner also errs in contending (Pet. 11, 15-16) that the court of appeals' interpretation of the Indian Preference exemption conflicts with the 1994 Amendments to the ISDA. Those Amendments address the use of Tribe-specific preferences in the context of "self-determination" contracts with the Departments of Interior and Health and Human Services that are "intended to benefit one tribe." 25 U.S.C. 450e(c). In that limited context, ISDA provides that "tribal employment or contract preference laws adopted by [a] tribe shall govern with respect to the administration of [a self-determination contract]." 25 U.S.C. 450e(c). The 1994 Amendments therefore authorize Tribe-specific preferences only with respect to certain "self-determination" contracts and only when the preferences are based on tribal laws. They do not sanction Tribe-specific preferences in any other circumstances. Since petitioner is not acting pursuant to an ISDA self-determination

contract (Pet. App. 15a), the 1994 ISDA Amendments are inapposite here.[3]

3. Finally, the court of appeals' holdings in this case do not affect the Tribe's authority to hire on the basis of tribal status. Tribal employers are entirely exempt from the reach of Title VII. See 42 U.S.C. 2000e(b) (excluding Tribes from Title VII's definition of "employer"). Nor does the decision below affect a reservation-based employer's ability to adopt, or a Tribe's authority to require, a general Indian preference. Such a preference will in many cases result in employment opportunities for the Tribe's own members. The only questions involved in the present petition are whether an employer's preference for members of a particular Tribe is a form of discrimination based on national origin and whether such a preference is justified by the Indian preference exemption. Because the court below correctly resolved those questions, and because no other court of appeals has addressed them, review by this Court is not warranted.

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[3] Petitioner contends (Pet. 11) that the court of appeals erred in failing to resolve the conflict that might exist between Title VII and ISDA in a case in which a private employer is performing work under a contract issued pursuant to ISDA. As the court of appeals explained (Pet. 17a & n.15), however, since petitioner is not acting pursuant to the ISDA, there is no occasion to resolve that potential conflict in this case. We note that the principles for resolving such a conflict are well established. See *Mancari*, 417 U.S. at 550-551 (when a general statute and a more specific statute conflict, the more specific statute controls).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

vs.

HAROLD DAWAVENDEWA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner, Salt River Project, submits this supplemental brief to respond to the Solicitor General's brief for the United States as amicus curiae. The United States argues that review is not warranted because the Ninth Circuit correctly decided the issues in this case. However, the United States' analysis that leads it to that conclusion is fundamentally flawed.

I. THE UNITED STATES ERRONEOUSLY REJECTS THE RELEVANT ANALYTICAL FRAMEWORK.

The United States' analysis is fundamentally flawed because it explicitly rejects the analytical framework this Court created specifically for cases such as this. This Court has repeatedly held that when interpreting statutes which raise issues of tribal sovereignty or self-governance, "the standard principles of statutory construction do not have their usual force." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 2403 (1985). Instead,

> traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop" *against which vague or ambiguous federal enactments must always be measured.*
>
> . . . Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44, 100 S. Ct. 2578, 2583-84 (1980) (emphasis added).

It is beyond dispute that the Ninth Circuit's narrow interpretation of Title VII's Indian preference exemption has a substantial effect on tribal sovereignty and self-governance. Indeed, the Ninth Circuit's decision effectively restricts the Navajo Nation's sovereign power to regulate employment practices on trust property within its own reservation, through either tribal ordinances or lease provisions.[1] Moreover, the Ninth Circuit's decision also puts in doubt the validity of every similar lease provision and tribal employment rights ordinances used by any of the hundreds of federally-recognized Indian tribes throughout the nation.

Even though the effect of the Ninth Circuit's decision on fundamental principles of tribal sovereignty is both obvious and dramatic, the Ninth Circuit completely ignored the required analytical framework. It justified doing so with the clearly erroneous conclusion that

---

[1] The regulation of employment practices on tribal lands is unquestionably part of a tribe's inherent sovereign power. *See Strate v. A-1 Contractors*, 117 S. Ct. 1404, 1413 (1997) ("tribes retain considerable control over nonmember conduct on tribal land"); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991) ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories."); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991) (tribe's inherent sovereignty includes authority to enforce employment ordinances on employers doing business within the reservation, even when such employers are located on non-Indian fee land).

"Native Americans' interests in self-governance [are] interests not present in this case." Pet. App. 8a.

The United States does not even attempt to defend the Ninth Circuit's clearly erroneous conclusion. Instead, it contends the Ninth Circuit was correct in ignoring the relevant analytical framework for an entirely different reason. Specifically, the United States suggests the analytical framework need not be applied in this case because "Petitioner's proposed construction of the Indian preference exemption . . . is not limited to protecting preferences that promote tribal sovereignty." United States Brief at 13-14. However, the United States' alternative justification for ignoring this Court's analytical framework is as plainly erroneous as the Ninth Circuit's.

In the first place, the United States cites no authority in support of its attempt to evade application of the analytical framework in this context. Indeed, there is no such authority.

Moreover, this Court's special Indian law analytical framework always applies whenever the statute to be interpreted raises issues of tribal sovereignty and self-governance. *See White Mountain Apache Tribe*, 448 U.S. at 143, 100 S. Ct. at 2583 (the analytical framework is "an important 'backdrop' against which . . . federal enactments must *always* be measured") (emphasis added). If, when viewed against that "important backdrop," one of the competing interpretations of the statute does not "comport with . . . the federal policy of encouraging tribal independence" then the interpreting court may reject that interpretation as contrary to congressional intent. *Id.* at 144, 100 S. Ct. at 2584. Similarly, if (as the United States

argues here) one of the competing interpretations has a broader effect than merely promoting tribal sovereignty, then that characteristic may also be considered when determining how to construe the statute most consistently with Congress' intent. The point, however, is that such characteristics must always be viewed in the context of the applicable analytical framework; they are not a justification for abandoning the framework altogether.

Finally, by criticizing the Salt River Project's construction of the Indian preference exemption because it "is not *limited* to protecting preferences that promote tribal sovereignty," United States Brief at 13 (emphasis added), the United States concedes that construction does, in fact, promote tribal sovereignty. By contrast, the Ninth Circuit interpretation has just the opposite effect. It abrogates tribal sovereignty and reduces tribal independence by limiting the tribes' ability to control employment practices (through tribal ordinances or lease provisions) on their own reservation lands. The United States offers no explanation of how this Court's analytical framework – the very purpose of which is to safeguard and promote tribal sovereignty – can be made inapplicable by an interpretation that promotes tribal sovereignty, leaving in its wake an interpretation which destroys tribal sovereignty and independence.

II. THE UNITED STATES IMPROPERLY IGNORES THE UNDERLYING CONGRESSIONAL PURPOSE OF TITLE VII'S INDIAN PREFERENCE EXEMPTION.

The United States' analysis is also fundamentally flawed because it ignores this Court's characterization of Congress' purpose underlying Title VII's Indian preference exemption. Because the central issue in this case is the interpretation of that statutory exemption, the task at hand is to ascertain the intent of Congress and give effect to it. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570, 102 S. Ct. 3245, 3250 (1982) ("Our task is to give effect to the will of Congress."). Yet, the United States makes no attempt to identify what Congress' underlying intent may have been.

The United States' silence is remarkable because this Court has already characterized the purpose underlying Congress' enactment of Title VII's Indian preference exemption (as well as the provision exempting tribes from Title VII's definition of "employer") as follows:

> This exemption reveals a clear congressional recognition, within the framework of Title VII, of the *unique legal status of tribal and reservation-based activities*. . . .
>
> . . . .
>
> . . . These 1964 exemptions as to private employment indicate Congress' recognition of the longstanding federal policy of providing a *unique status to Indians in matters concerning tribal or "on or near" reservation employment.*

Morton v. Mancari, 417 U.S. 535, 545-46, 94 S. Ct. 2474, 2480-81 (1974) (emphasis added); *see also* 110 Cong. Rec. 13702 (1964) (commenting on both of Title VII's Indian exemptions, Senator Mundt asserted they would "assure our American Indians of the continued right to protect and promote their own interests. . . . "). Thus, the fundamental purpose of Title VII's Indian preference exemption – like that of the many other Indian employment preference laws Congress has enacted – is to assist "Indian tribes . . . to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. at 542, 94 S. Ct. at 2479.[2]

Because the United States does not bother to identify Congress' underlying purpose, it similarly fails to discuss whether, and how, the Ninth Circuit's interpretation comports with that purpose. This failure is also remarkable because the United States goes to the trouble of arguing that the Ninth Circuit's decision is consistent with the EEOC and other agency interpretations of the Indian preference exemption. United States Brief at 12-13. But it does not analyze whether that interpretation is consistent with Congress' intent[3] – the only intent that really matters when interpreting congressional enactments.

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[2] In stark contrast to this Court's statement of Congressional intent, the Ninth Circuit erroneously concluded that Congress' purpose was "to compensate for the effects of past and present unjust treatment" of Indians. Pet. App. 12a.

[3] The United States expresses its "doubt" that Congress intended certain results which allegedly may flow from the Salt River Project's construction of the statute, but does so without identifying any congressional purpose that might justify such a doubt. United States Brief at 11.

Had the United States analyzed the Ninth Circuit's decision in light of this Court's characterization of Congress' intent underlying Title VII's Indian preference exemption, the Ninth Circuit's error would have been apparent. The Ninth Circuit's narrow interpretation of that exemption does not promote the "unique" sovereign status of Indian tribes or their right to protect their own interests "in matters concerning tribal or 'on or near' reservation employment." To the contrary, the Ninth Circuit's construction abrogates tribal sovereignty and self-governance, and is therefore antithetical to Congress' intent.

III. THE UNITED STATES ERRONEOUSLY ATTEMPTS TO AVOID CONSIDERATION OF THE POLITICAL CLASSIFICATION ISSUE.

Finally, the United States' analysis is also flawed because it mischaracterizes the *Morton v. Mancari* issue raised in the Salt River Project's petition. Contrary to the United States' assertion, the issue of whether the tribal affiliation preference at issue in this case is a political classification, and not based on race or national origin, is properly before this Court.

Morton v. Mancari determined that the classification between Indians and non-Indians at issue in that case was political and not racial because it was "reasonably designed to further the cause of Indian self-government," and was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." 417 U.S. at 554-55, 94 S. Ct. at 2484-85. Relying on that determination, the Salt River Project argued that

Respondent's Title VII claim should be dismissed because the tribe-specific preference which the Navajo Nation required it to provide was even more clearly based on membership in "quasi-sovereign tribal entities," and not based on race or national origin.

The United States admits the Salt River Project's preference at issue in this case "could arguably be viewed as 'political.' " United States Brief at 9. It nevertheless contends that this Court's review is not warranted to correct the Ninth Circuit's error because "[t]he court of appeals did not address . . . whether an on-reservation employer's preference for members of a particular Tribe in conformity with an ordinance of that Tribe (or the terms of a lease of the trust property of that Tribe) should be viewed as a political classification." United States Brief at 9. Indeed, the United States suggests the Salt River Project did not even make that argument.

The United States is wrong. That is precisely the argument the Salt River Project has asserted throughout this litigation, including its petition for certiorari now pending before this Court. Pet. at 20 ("Although *Morton v. Mancari* did not deal with the precise issue in *this case*, the principles it established clearly apply *here*.") (emphasis added). The Salt River Project asserted its argument in the context of the facts of *this* case, which are: the Salt River Project's electric generating facility is located on tribal trust lands on the Navajo Reservation; the Navajo Nation has an ordinance that requires that a preference must be given to its members for work performed on its reservation; and the lease between the Navajo Nation and the Salt River Project contains a similar preference. Accordingly, the facts of this case are inextricably

connected with the reservation, and the United States' characterization of the issue so as to avoid review should be rejected.

IV. CONCLUSION

The United States' argument that review in this case is not warranted because the Ninth Circuit correctly decided the issues is itself based on a flawed analysis. When Title VII's Indian preference exemption is interpreted in the context of the Indian law analytical framework this Court has established, and when it is interpreted in light of the congressional purpose underlying that exemption (as identified by this Court in *Morton v. Moncari*) the Ninth Circuit's error is clear. The United States improperly ignores both the applicable analytical framework and Congress' intent. Accordingly, the Salt River Project's petition should be granted.

Respectfully submitted,

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